INTRODUCTION

TO THE

LAW

OF

TENURES.

Satius est petere fontes quam sectari rivulos. Lord COKE.

Prosunt minus recte excogitata, quum alios incitent saltem ad veritatis Investigationem. FEUERB. A BARTOL.

By SIR MARTIN WRIGHT,

Late one of the JUDGES of the Court of KING'S BENCH.

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MDCCXCII.

TO

THE RIGHT HONOURABLE

Sir ROBERT RAYMOND, Kt.

LORD CHIEF JUSTICE of the COURT of KING'S BENCH,

AND

One of his MAJESTY'S moſt HONOURABLE PRIVY COUNCIL.

MY LORD,

THE Honour you have done this Treatiſe, by ſuffering it to paſs your Lordſhip's Hands without Cenſure, hath encouraged me to offer it to the Public under your Protection.

The Deference which is juſtly paid to your Lordſhip's Judgment by the Students and Profeſſors of the Law in particular,

particular, and which is equally due from all, who look into our legal Conſtitution or Polity, cannot fail to give this Piece a favourable Reception, if, upon a ſecond Reading, your Lordſhip ſhall think it deſerves your Patronage.

My Lord, while I am thus providing for the Succeſs of my Endeavours, I cannot help boaſting the Advantage it gives me of declaring to the World, that I am, with the greateſt Reſpect,

MY LORD,

Your Lordſhip's

moſt obedient Servant,

M. WRIGHT.

AN

INTRODUCTION, &c.

THE Deſign of this Treatiſe is to ſhew the Original, the Eſtabliſhment, and the Nature of TENURES: And becauſe all that Part of our Common Law, that concerneth TENURES, hath Original from the FEUDAL LAW (a), I propoſe to proſecute it in the following Method.

I. I ſhall collect, and throw together [in the beſt Manner I can] ſo much of the Law or Doctrine of FEUDS, as ſeems neceſſary, and wanting to a right Apprehenſion of TENURES.

(a) *Vide* Sir *Hen. Spelman's Poſthum. Treatiſe of Parliaments* 57, 58. *Poſthum. Treatiſe of Feuds and Tenures by Knight-Service* per totum; and *Gloſſ. ad verbum Feodum.* Crag. de jure feud. L. 1. dieg. 7. And *Philips* his *Treatiſe of Tenures* in Capite, *and by Knight-Service*, per totum.

II. I ſhall endeavour to diſcover the Time when, and the Authority or Law it ſelf, by which FEUDS or FEES were eſtabliſhed in *England*, and by which the Law of FEUDS became a Part of our COMMON LAW: And ſhall take occaſion to ſhew that WARDSHIP, MARRIAGE, RELIEF, and the like Fruits [or ſeeming Grievances] of TENURE were either properly FEUDAL, or that they prevailed among us as ſuch, in Conſequence of our own Conſent to the Introduction or Fiction of TENURES.

III. I ſhall conſider the main Principles, Qualities, and Rules of TENURE, and ſhall ſhew that they are plainly FEUDAL, and that they are to be accounted for only as ſuch.

CHAP.

CHAP. I.

Of the Law of Feuds.

AS I do not mean to exhibit a tedious or minute Treatiſe of FEUDS, I ſhall not prejudice or perplex the Reader with trifling Etymologies (b), imperfect Definitions (c), or contradictory Gloſſes: But ſhall confine my ſelf to ſuch Texts as are generally agreed, and ſhall offer ſuch an Account of the Policy and Nature of FEUDS in general, as may ſupply the Want of a formal Definition; and ſhall barely propoſe Mr. *Somner's Etymon*, becauſe it ſeems too rational to be ſlighted, and is in Truth too good a Baſis to be neglected.

(b) Whereof there are many. *Du Freſne Gloſſ. ad verb. Feudum. Somner Treatiſe of Gavelk.* 104. *Stry Exam. jur. feud. cap.* 2. *Q.* 1. *Crag. de jure feud.* 40, 41.

(c) It being impoſſible to warrant, or ſuggeſt the ſeveral Kinds of Modern or improper Feuds, within the Compaſs of any Definition or Deſcription whatſoever: Upon which Account the Feudiſts ſay, that *Omnis definitio in jure periculoſa eſt.* Vid. Crag. de jur. feud. 42, 43. Zaſius in uſus feud. 3.

Mr. *Somner* then ſuppoſes, that the Word "*Feud* is a *German* Compound, " which conſiſts of *Feh*, *Feo* or *Feoh*, " ſignifying a Salary, Stipend or " Wages (d), and of *Hade*, *Head*, or " *Hode*, importing Quality, Kind, " or Nature (e); ſo that (ſays he) " *Feudum*, *Fee*, or Land holden in " *Fee*, is no more (conſidered in its " firſt and primary Acceptation) than " what was holden in *Fee-hode*, by " Contraction *Feud* or *Feod*, *i. e.* in " a ſtipendiary, conditional, merce- " nary Way and Nature, with the Ac- " knowledgment of a Superior, and a " Condition of returning him ſome " Service for it, upon the With- " drawing whereof, the Land was re- " vertible unto the Lord (f)." This *Etymon* not only ſuggeſts the moſt probable Account of the Word, but

(d) Vide Schilt. Cod. jur. Aleman. de nat. Succeſſion. feudi, Cap. 1. Sect. 3. & Comment. ad Rubr. Sect. 7. and *Spelm. Poſthum. Treatiſe of the ancient Government of* England 51.

(e) *Somn.* Treatiſe of Gav. 106,—108. Vid. *Spelm.* Gloſſ. ad verb. Feodum.

(f) *Somn.* Treatiſe of Gav. 110, 111.

gives

gives us the cleareſt Deſcription of the Thing it ſelf, and is agreeable to the *Book of Feuds* (g), which ſays, that *Beneficium* (Feudum ſcilt.) (h) *illud eſt, Quod ex benevolentia ita dabatur alicui, ut proprietas rei penes dantem remaneret, uſusfructus ad accipientem ejuſq; hæredes pertineret ad Hoc, Ut ille & ejus hæredes Domino fideliter ſervirent:* The Senſe whereof is thus expreſſed by Mr. *Selden*, viz. " *Feuds* or *Feuda* being the ſame, " which in our Laws we call *Tenan-* " *cies* or *Lands held*, and *Feuda* alſo, " are Poſſeſſions ſo given and held " that the Poſſeſſor is bound to do " Service to him, from whom they " were given (i)."

This Service was originally purely Military (k), and the Poſſeſſor's or Feudatary's *Homage* or *Fealty*, was

(g) Feud. Lib. 2. Tit. 23.

(h) Feuds were antiently called *Beneficia, ut infra*, p. 19. Hence many Eccleſiaſtical Feuds are to this Day called Benefices. *Vide Spelman's Poſthum. Treatiſe of Feuds* 9.

(i) *Seld.* Tit. of Honor 273.

(k) Vide infra 19, 27.

(as it ſeems) in the *Infancy of Feuds*, a Kind of military Engagement, rather implied than expreſſed (l), to be faithful to his Benefactor, and alſo Aſſiſtant unto him (m). Sir *Henry Spelman* therefore calls a *Feud*, *Prædium militare* (n), and Mr. *Somner* ſays (o), that every Inheritance is improperly and corruptly called a *Fief* or *Fee*, that is not holden *Militiæ gratia*, the Ground of all *Fees* (p).

To manifeſt the Truth of this Aſſertion, it is neceſſary to take a ſhort View of the Original of *Feuds*; which were a military Policy of the northern conquering Nations (q), devi-

(l) Vide infra 27.

(m) *Seld.* Title of Honor 274.

(n) Poſthum. Treatiſe of Feuds 6.

(o) Treatiſe of Gav. 49.

(p) *Feudorum inventum peperit rei Militaris neceſſitas.* Spelm. Gloſſ. ad verb. Feudum.

Omnia Feuda ad militiæ ſubventionem expeditiorem inventa ſunt. Gregorii Syntagma jur. Univ. Lib. 6. Cap. 4. Sect. 1.

(q) *Conſtat Feudorum originem a Septentrionalibus Gentibus defluxiſſe, &c.* Crag. de jure feud. 25, 375. Schilt. Com. ad jus Feud. Alaman 8. *Seld.* Title of Honor 274. *Spelm. Gloſſ. ad verb. Lex. Hic contractus* [ſcilicet Feudalis] *proprius eſt Germanicarum Gentium, neq; uſquam invenitur, niſi ubi Germani ſedes poſuerunt.* Grot de jure Belli & Pacis Lib. 1. Cap. 3. Sect. 23.

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ſed as the moſt likely Means to ſecure their new Acquiſts, and were large Diſtricts or Parcels of Land given or allotted by the conquering General, to the ſuperior Officers of his Army, and by them dealt out in leſs Parcels to the inferior Officers, and moſt deſerving Soldiers (r): Theſe Allotments or Portions of Victory naturally engaged ſuch as accepted them to defend them; and as a Part could not be preſerved independent of the Whole, all Givers, as well as Receivers, were mutually and equally concerned to defend the Whole; but as

(r) *Cum ex Septentrione (quam Plinius officinam gentium veriſſimè dixit) Innumeræ Gentes domi inopia rei familiaris preſſæ egrederentur novas ſedes petituræ, Gothi, Vandali, & Hunni, tandem etiam Longobardi [ut de aliis taceam] Imperium Romanum diripuiſſent, Regiones ex hoſte captas militari more inter ſe diviſerunt, ut non minor Inferiorum quam Principum in his Expeditionibus haberetur Ratio, &c.* Crag. de jure feud. 19, 20, 376. And Sir *William Temple* ſpeaking of the *Saxons* ſays, That their Princes or Leaders of their ſeveral Nations, became *Konings* or Kings of the Territories they had ſubdued, and that they reſerved Part of the Lands to themſelves for their Revenue, and ſhared the reſt among their chief Commanders by great Diviſions, and among their Soldiers by ſmaller Shares. *Temp. Introduct. to the Hiſt. of* England 65.

that could not be done in a tumultuary Way, Order, and to that End a military Subordination was neceſſary; and therefore each Receiver was ſuppoſed, in Conſequence of his Acceptance of any Portion, to oblige himſelf as long as he held it, to attend to, and enter into Meaſures for the Security and Defence of the Whole, whenſoever he ſhould be required (ſ) by his Benefactor or immediate Superior, and was likewiſe ſuppoſed to be accountable to him as his Commander or Leader, for his Attendance, and a faithful Diſcharge of his Duty: Such Benefactor or Superior was likewiſe ſubordinate to, and under the Command of his Benefactor or Superior, and ſo upwards to the Prince or Chief himſelf. Thus a proper military Subordination was naturally and rationally enough inferred and eſtabliſhed; and an Army

(ſ) *Quantum ad ſervitia præſtanda —— Vaſallus quamdiu feudum tenet, & non ultra, Domino juſta bella moventi tenebitur —— Præſtabit autem ea ſervitia non niſi requiſitus.* Zaſius in uſus feud. f. 29.

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of Feudataries were, as ſo many Stipendiaries, always on Foot, ready to muſter and engage in the Defence of their Country (t): So that the feudal

(t) *Loyſeau's* Account of the Diſtribution of *Gaul* among the *Franks* being of this Nature, I ſhall here tranſcribe the Subſtance of it, *viz. Quant au terres de la Gaule, Les Francois victorieux les conſiſquerent toutes.—Et hors celles, qu'ils retindrent au Domaine du Prince, ils diſtribuerent toutes les autres par Climats & territoires aux principaux Chefs & Capitaines de leur Nation. Donnant a tel toute une Province a titre de Duchè: a tel autre un pays de Frontiere a titre de Marquiſat: a un autre une ville avec ſon territoire adjacent a titre de Comtè: bref á d'autres des Chaſteaux ou villages avec quelques terres d'alentour a titre de Baronne, Chaſtellenie, ou ſimple Seigneurie, ſelon les merites particuliers de chacun, & ſelon le nombre des ſoldats qu'il avoit ſoubs luy; car c'eſtoit tant pour eux que pour leurs ſoldats — Ils ne concederent pas ces terres a leurs Capitaines pour en jouyr en toute Franchiſe, & ſans preſtation ou redevance aucune, ains les concederent a titre de Fief, c'eſt a dire a la charge d'aſſiſter a tous jours le Prince Soverain en guerre.—— Et non ſeulement le Prince Soverain des Francois conceda a ſes Capitaines tant pour eux, que pour leur ſoldats, les terres de leur partage a titre de Fief vers luy: mais auſſi ces Capitaines baillerent a chacun de leurs ſoldats la part, qu'il leur en voulurent conceder, a meſme titre de Fief vers eux, c'eſt a dire a la Charge qu'ils ſeroient tenus les aſſiſter en guerre toutefois & Quantes qu'il en ſeroit beſoin, & par ce moyen leurs compagnies demurerent entieres pour jamais. ——— Ces Capitaines avoient le commandement & puiſſance publique en qualite d'officiers, eſtant tous jours demeurez en leur charges de Capitaines, En tant que par le moyen des Vaſſaux, qu'ils avoient ſoubs eux, leur Compagnies & bandes eſtoient maintenues a perpetuite, & de faict aux livres des Fiefs ils ſont appellez* Capitanei Regis *aut* Regni. Loyſeau Traite de Seigneurie 13, 14, 16.

Returns

Returns of *Fealty*, or mutual Fidelity, and Aid were not originally *ex pacto* (u), but ſeem to have been politick, or rather natural, Conſequences drawn from the apparent Neceſſity, theſe warlike People were under, of maintaining their Ground with the ſame Spirit, and by the ſame Means they had got it. But as the Princes of *Europe* were every Day more and more alarmed by the Progreſs of the northern Standard, many of them went into this or a like Policy, as the ſtrongeſt Intrenchment; and in Imitation of it, they, reſerving the *Dominium* or *Propriety* of the Lands they gave, parcelled out ſome of their own Poſſeſſions or Territories under an *expreſs Fealty* (w), engaging their

(u) Renders (or Services as now called) were not originally *ex pacto vel dicto*, for that was but *Cautela ſuperabundans*, but of common Right. *Spelm. Treat. of Parliaments* 57.

(w) *Laborante ſeculo antiquiori bellis undequaque graviſſimis, Imperatores, Reges, Principes conſultius ducunt patriciis & magnatibus ſuis [quos Capitaneos vocabant] Regiones integras, præſertim finitimas & hoſti expoſitas diſtribuere, non ut ſibi has Integre poſſidentes opes eraderent:*

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their Beneficiaries or Feudataries, to make them like Returns of Fidelity and Aid, as followed from the Deſign and Nature of an *original Feud* (x), from whence the feudal Obligations probably began to be conſidered as *Renders*, or *Services of Render*, calculated for the Benefit of the Proprietary, who was, in reſpect of the *Dominium* or *Propriety* remaining in him, from henceforth called *Dominus* (y).

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Sed ut diſtractas in idoneas portiones ſingulas ſingulis militibus [habito perſonarum reſpectu] Feudi, i. e. ſtipendii nomine elocarent; Qui & cum ipſis patriam unanimiter tuerentur [fidei Interpoſito jurejurando] & Militanti Principi in auxilium venirent evocati. Spelm. Gloſſ. ad verb. *Feodum.* —— The ſame Author (in his *Treatiſe of Parliaments* 57, 58.) ſuppoſes, that the King of *England* did in the Beginning portion out the Lands of *England* in this Manner: And the Lord *Coke* aſſerts, that the firſt Kings of this Realm had all the Lands of *England* in Demeſne; and *les grand Mannors & Royalties* (ſays he) they reſerved to themſelves, and of the Remnant they, for the Defence of the Realm, infeoffed the Barons of the Realm, *&c.* 1 *Inſt.* 58. *b.* 2. Of theſe Opinions, *inf.* 29, *&c.*

(x) *Ego Titius juro—Quod ab hac hora ero Fidelis—ſicut debet eſſe Vaſallus Domino.* Feud. Lib. 2. Tit. 7.

(y) *Dominus appellatur is, Qui feudum in re ſua alteri fruendum conſtituit, idcirco ut vulgo creditur, quia rei in feudum datæ dominium & proprietatem retinuit, ſolum*

* *uſum-*

The feudal Policy having obtained thus far, the few Countries that had not [as above] gone into it confederated themſelves *Prince* and *People*, as *Lord* and *Feudatary*, to ſtand by and aſſiſt each other in Caſes of common Danger and Concern: (z) In Conſequence whereof, and of the *Fealty* expreſſed or implied in ſuch Confederacy, every Man's Poſſeſſion was conſidered as a FEUD or *Stipend*, and became as ſuch a Pledge or Security for the due Obſervance of his *Fealty* (a); ſo that the feudal Policy thus

uſum-fructum Feudi nomine conceſſit. Hotoman. de verb. Feudal. ſub verb. *Dominus.*

Dominus in Jure definitur, Qui proprietatem rei habet. Crag. de Jure feud. 43.

Thus the *French* Words *Seigneur* and *Sieur*, and the *Engliſh* Words *Sire* and *Sir*, are all of them Appellations reſpecting Propriety. *Vide Loyſeau Traité des Seigneuries* 5, 6.

(z) Whether this was not our Caſe in *England*, will be inquired hereafter, *p.* 58, 78.

(a) *Note*; That *Fealty*, whether implied or expreſſed, was an Engagement between the *Superior* and *Inferior*, or *Lord* and *Feudatary*, (as now called) mutually to comply with the ſeveral Obligations reſulting from the Nature of an *original Feud*; for though *Fealty*, when expreſs, was ſworn only by the Feudatary and is explained in the *Book* of *Feuds* (*Lib.* 2. *Tit.* 4.) to be *Jus-*

thus hinted, and thus advanced, was now become the military Policy of the weſtern Parts of the World (b); and military Aid or Service (as now called) was underſtood to be the real or fictitious Terms of all Propriety or Poſſeſſion in *Europe*.

This general View of the Original and Progreſs of FEUDS, being ſufficient to ſuggeſt their Nature; I ſhall now proceed to the Doctrine of FEUDS,

jurandum quod a vaſallo præſtatur Domino: Yet that it was binding on both Sides, appears from the moſt authentick Explications of this Engagement: Thus according to the *Book* of *Feuds* (Lib. 2. Tit. 6.) *Qui Domino ſuo fidelitatem jurat, iſta ſex in memoria ſemper habere debet, Incolume, tutum, honeſtum, utile, facile, poſſibile ——Sed quia non ſufficit abſtinere a malo, niſi fiat quod bonum eſt, reſtat ut in ſex prædictis concilium & auxilium Domino præſtet: Dominus quoq; in his omnibus vicem fideli ſuo reddere debet:* And thus according to *Ravenna* (in Conſuetud. Feud. Lib. 2. Tit. 6. p. 115.) *Dominus non tenetur jurare Vaſallo fidelitatem, ſed in effectu tenetur ſibi in tantum abſq; ſacramento, in Quantum tenetur Vaſallus Domino cum ſacramento —— Et vice mutua eſt obligatus Dominus Vaſallo ſuo virtute dictæ fidelitatis (ſcilicet) a Vaſallo juratæ.* Vide Crag. de jure feud. fo. 44, 45. Hanneton de jure feud. L. 1. Cap. 13.

(b) Sir *Henry Spelman* calls the feudal Law the Law of Nations; for ſo, ſays he, I may term it then (ſpeaking of very early Times) to be in our weſtern Orb. *Spelm. Poſthum. Treat. of Parliaments* 57.

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confining my ſelf to ſuch Heads or Branches of it, as moſt directly lead to the Knowledge of *Tenures*.

FEUDS, *Fiefs* or *Fees* were originally precarious, and held at the Will of the Lord (c); then they became certain for one Year (d), and were ſome Time after given for Life (e); but though FEUDS were not at this Time hereditary, yet the Vaſſals or feudal Tenants were called *Nativi*, as if born ſuch; and it was unuſual, and even thought hard to reject the Heir of the former Feudatary, provided he was able to do the Services of the FEUD, and the Lord had no juſt Objec-

(c) *Antiquiſſimo tempore ſic erat in Dominorum poteſtate connexum, ut quando vellent, poſſent auferre Rem in feudum a ſe datam.* Feud. Lib. 1. Tit. 1.——*Statim ab initio originis feudorum in Domini feudum concedentis poteſtate fuit, feudum conceſſum quandocunq; vellet precarii inſtar, revocare.* Hanneton de jure feud. 139. Somn. Treat. of Gav. 108.

(d) *Poſtea vero eo ventum eſt ut per annum tantum firmitatem haberent.* Feud. Lib. 1. Tit. 1.——*Deinde uſu inolevit ut per annum integrum Feudum ſemel conceſſum firmitatem haberet.* Hanneton de jure feud. 139.

(e) *Deinde Statutum eſt ut uſq; ad vitam Fidelis produceretur.* Feud. Lib. 1. Tit. 1.——*Poſtea vero eo ventum eſt, ut ad Recipientis vitam perduraret.* Hanneton de jure feud. 139.

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tion againſt him (f): But though the Lord did not remove the Heir from the FEUD, yet it is not likely that he ſucceeded abſolutely as of Courſe; but that he paid a Fine, or made ſome Acknowledgment, in the Nature of *Relief* (g), for the Renewal of the FEUD; and though ſuch Fine or Acknowledgment was originally made to ſecure the Succeſſion, which was then arbitrary, and at the Will of the Lord; yet it was continued even after FEUDS became hereditary (h), and is

(f) *Licet Hæreditaria Succeſſio tum non erat in feudis, Nativi tamen hi Tenentes dicebantur ut apud Nos hodie, quos niſi juſta offenſæ cauſa præceſſerit, & ad ſerviendum non ſufficerent, durum erat a ſuis poſſeſſionibus removere.* Crag. de jure feud. 20, 21.

(g) *Relevium eſt præſtatio hæredum, Qui quum veteri jure feudali non poterant ſuccedere in feudis, caducam & incertam hæreditatem relevabant, ſoluta ſumma vel pecuniæ vel aliarum rerum pro diverſitate Feudorum.* Schilt. Cod. de Bonis Laudemialibus, Sect. 52.——According to *Hotoman*, *Relevium dicitur Honorarium, quod novus Vaſallus Patrono introitus cauſa largitur, quaſi morte alterius Vaſalli, vel alio quo caſu feudum ceciderit, quod jam a novo ſublevetur.* Vide Hot. de verb. feudal. Et Gloſſ. ad X. Scriptores ad verb. *Relevium.*

(h) Thus in *Germany*, the old acknowledgment was continued by an expreſs Proviſion in the Conſtitution, by which Feuds were made hereditary, *viz. Servato uſu majorum Valvaſorum in dandis Equis & armis ſuis Senioribus.* Vide Feud. Lib. 1. Tit. 1. Et Leges Longobard. Lib. 3. Tit. 8. Sect. 4.

well

well known at this Day (tho' by ſeveral Names) in moſt Countries.

FEUDS were afterwards extended, beyond the Life of the firſt Vaſſal or feudal Tenant, to his Sons or ſome one of them, whom the Lord ſhould name (i); but in ſuch Caſe the feudal Donation (k) was not extended beyond

(i) *Sic progreſſum eſt ut ad filios deveniret in quem (ſcilt.) Dominus hoc vellet beneficium confirmare.* Feud. Lib. 1. Tit. 1.——*Proindeq; receptum ut ad eos Vaſalli filios quibus id beneficii feudi Dominus conceſſiſſet deveniret, & poſtmodum temporis tractu inductum eſt ut ad omnes Vaſalli filios maſculos Inteſtata feudi Succeſſio æqualiter pertineret.* Hanneton de jure feud. 139. Schilt. Cod. de nat. Succ. feud. Cap. 1. Sect. 5.

(k) Though the Feudiſts have generally conſidered Feuds as mere Donations: Yet Mr. *Somner (Treat. of Gav.* 111.) ſays, that the feudal Grant, in reſpect of the incident Services, is improperly called a Donation, being but *feodalis dimiſſio, i. e.* a Demiſe in Fee: But ſtill the Feudiſts did properly enough call it a Donation. *1ſt*, Becauſe it was not originally ſuppoſed to be made for any immediate or contracted Equivalent; and the Services were rather Conſequents of the Relation ariſing from the Feud or the general feudal Policy, *(ut ſupra)* than immediate Returns, in Conſideration of the Feud or Benefit conferred by the Lord; and thus *Grotius* muſt be underſtood, when he ſays (in his Treatiſe *de jure Belli & Pacis Lib. 2. Cap. 12. Sect.* 5.) that *in feudali contractu rei feudalis conceſſio beneficium eſt, Pactio autem militaris operæ pro tutela eſt, facio ut facias.* 2*dly*, Becauſe as the Lord had the free Choice of his Vaſſal, and confer'd the Feud on whom he pleaſed, and the Services of the Feud were not ſo much calculated for the particular Advantage

beyond the Words by any preſumed Intent, but was taken ſtrictly (l), inſomuch, that if the Donation was to a Man and his Sons, all the Sons ſucceeded *in Capita*; and if one of them died, his Part did not deſcend to his Children, or ſurvive to his Brothers, but returned to the Lord (m): In Proceſs of Time Grandchildren ſucceeded to Sons, and Brothers to Brothers (n), if the FEUD was *antiquum aut pater-*

vantage of the Lord, as for the Defence of the Community united under a feudal Policy; the Preference given, and Intereſt moving from the Lord, was a Benefit conferred in ſuch a Manner, that in reſpect to the Lord, It might very well be called a Donation: *Et licet* ſays *Crag.* (de jure feud. 42.) *Feuda aliter hodie comparentur, interveniente ſæpiſſimè pretio, aut alia re pro pretio, Denominatio tamen fit ab eo quod prævalet——Et Quanquam pretio interveniente, tamen juſtum pretium nunquam numeraſſe præſumitur, Qui ſe fidelitatis & obſequii vinculo alii aſtringit; vinculum enim hoc obſequii pro parte pretii eſt: Itaque feudum liberum & gratuitam donationem definimus ad illud quod fieri debet attendentes, non ad id quod in hoc corrupto ſæculo apud degeneres homines in uſu frequenti videmus.*,

(l) *Feudum ex ſua natura eſt ſpecies quædam Donationis, & æquum eſt ut omnes Donationes ſint ſtricti juris, ne quis plus donaſſe præſumatur, quam in Donatione expreſſerit.* Crag. de jure feud. 50.

(m) Crag. de jure feud. 21, 22.

(n) *Poſtremo vero Lege a Conrado Imperatore promulgata* (feud. Lib. 5. Tit. 1.) *ad Nepotes ex filiis maſculis*

paternum, that is to ſay, not newly purchaſed, but came to the Brother, by Diſcent from his Father: But if the FEUD was what the Feudiſts called *Novum*, that is to ſay, newly purchaſed or acquired by a Brother, a Brother ſhould not ſucceed to it; unleſs it was by Virtue of an expreſs Proviſion in the Conſtitution of the FEUD (o). And at length not only Deſcendents in the direct Line ſucceeded *in Infinitum*, but Collaterals alſo without Regard to their Degree, provided they were deſcended from, and were of the Blood of the firſt Feudatary (p).

Sir

hoc ipſum productum fuit. Hanneton de jure feud. 139, 140.——*Cum vero Conradus Romam proficiſceretur petitum eſt â fidelibus, Qui in ejus erant ſervitio, ut Lege ab eo promulgata, hoc etiam ad Nepotes ex filio producere dignaretur, & ut frater fratri ſine legitimo Hærede defuncto in Beneficio quod eorum patris fuit, ſuccedat.* Feud. Lib. 1. Tit. 1, 19. Lib. 5. Tit. 1. Spelm. Poſthumous Treatiſe of Feuds 4. Crag. de jure feud. 21, 22.

(o) Feud. Lib. 1. Tit. 1, 8, 14, 20. Lib. 2. Tit. 12. 90.——Crag. de jure feud. 22, 163, 242.

(p) *Tandem factum eſt ut Feuda non ſolum ad Deſcendentes in perpetuum tranſirent, ſed etiam ut ad Collaterales, Qui ex primo Vaſallo deſcendebant, in Infinitum*

Sir *Henry Spelman* ſays (q), That theſe ſeveral Conditions of FEUDS had their ſeveral Denominations, that is to ſay, while they were precarious they were called *Munera*; afterwards when they became temporary and for Life, they were called *Beneficia*; and that they were firſt called *Feuda* when they began to be granted in Perpetuity, and not before: And agreeably to this, Mr. *Somner* calls *Beneficium*, *Feudum*'s elder Brother, and ſays that *Feudum* was a Word not known until about the Year 1000 (ſ).

FEUDS being thus eſtabliſhed, and all feudal Poſſeſſion being at this Time of military Obligation, and in the Hands of military Perſons, who, being under frequent Incapacities to cultivate and manure their own Lands, found it neceſſary to commit Part of

tum continuarentur. Crag. de jure feud. 22, 50, 242, 243, 244. Feud. Lib. 1. Tit. 1. Shilt. de Nat. Succeſſion. Cap. 1. Sect. 8. Spelm. Poſthum. Treatiſe of Feuds 4, 5. Zaſius in uſus feud. 46.

(q) Vide Spelm. Poſthum. Treatiſe of Feuds 4, 6, 9.

(ſ) Treatiſe of Gavelkind 102. Vide Schilt. de Nat. Succ. Cap. 1. Sect. 3.

them to ſuch Perſons as, having no feudal Poſſeſſion of their own, were glad to poſſeſs them upon any Terms: To ſuch Perſons therefore they gave ſome ſmall Portions of their Lands, obliging them to ſuch Returns of Service, Corn, Cattle or Money (u), as might enable them to attend to the feudal Duties, without Interruption from Affairs of a lower Nature, and of mere private Concern: By means whereof the feudal Policy was conſiderably extended, in regard that all Perſons accepting any Kind of Intereſt in a FEUD, did not only implicitly engage to do nothing to the Prejudice of it, but were, under an expreſs or implied *Fealty*, obliged to anſwer the ſtipulated Renders, and to promote the Peace and Welfare of the *feudal Society*.

Theſe, and ſuch like Intereſts, being in this View conſidered as

(u) Vide Crag. de jure feud. 20, 65. Loyſeau Traite des Seigneuries 15.

FEUDS

FEUDS (w), the ancient *feudal Simplicity* branched out into great Variety, and gave Way to ſo many Devices, that it became a neceſſary Rule or Direction of the Law of FEUDS, that in the Conſideration of a feud *Tenor* (x) *Inveſtituræ eſt inſpiciendus*, and that for the Reaſon expreſſed in a

(w) *Qualitercunque datum fuerit* (Feudum) *ſive ad proprium, ſive ad Libellum, Licet propriam feudi naturam non habeat, jure tamen feudi cenſebitur.* Feud. Lib. 2. Tit. 44, 48. *Nec obſtat quod Feudum improprium non ſit Feudum, cenſetur tamen jure feudi, hinc & ſtatuta de feudis loquentia, etiam ad impropria ſpectant.* Stry. Exam. jur. feud. Cap. 3. Q. 2. *Quod in materia feudali ea, quæ ſtatuuntur in milite, habent locum in non Milite, & intelliguntur etiam pro quolibet ſimplici Vaſallo.* Ravenna in Conſuetud. feud. 64. And according to *Zaſius*, *Si Vaſallo feudum ita concedatur, quod pro ſervitiis annuam vini, frumenti, pecuniæ penſionem præſtare poſſit, & ad alia ſervitia non teneatur, Ea conventio a feudo degenerat cujus eſt Natura ut incerta ſint ſervitia* (addas & Militaria): *In aliis tamen feudum remanet, quia Obligationem ſervitiorum in aliud onus commutare, non eſt contra ſubſtantiam feudi.*——*Nam feudi ſubſtantia eſt, Vaſallum eſſe Fidelem, & Domini rebus, bonis, honori, vitæ, non inſidiari, feudumque a Domino recognoſcere.* Zaſius in uſus feud. 117, 121.

(x) *Tenor eſt pactio contra communem feudi naturam ac rationem in contractu Interpoſita.* Hotoman. de verb. feud. In verb. Tenor. Feud. Lib. 2. Tit. 2. Sect. 2.—— *Tenor eſt qui dat Legem feudo, & plerumque naturam feudi mutat,* Crag. de jur. feud. 50. Zaſius in uſus feud. fol. 123.

like Maxim of our Law, *Modus legem dat Donationi.*

The Feudiſts therefore in order to preſerve the genuine Notion of a pure original FEUD, and to digeſt as far as poſſible, the various new invented FEUDS, or Forms of Donation, have drawn up ſeveral Syſtems (y) of FEUDS, which they principally divide into *Feuda propria vel recta, & Impropria vel Degenerantia* (z).

(y) The firſt of them are to be found at the End of the *Corpus Juris Civilis*, and are ſuppoſed to have been written by *Gerardus Niger* and *Obertus de Orto*, about the Year 1170. (or 1154. according to *Barbeyrac*, Notes on *Puffendorf de jur. nat. Lib.* 4. *Cap.* 8. *Sect.* 12.) at the Command of the Emperor *Frederick*: But *Crag.* takes them to have been only *tumultuariè conſcripti ex adverſariis ſive Schedis Gerardi & Oberti relictis, ab alio quam ipſis collectis; Obertus enim & Gerardus, prout quæque facti ſpecies occurrerat, conſulti quid de eo ſentirent, ſcripto declararunt: Hæc eorum Adverſaria poſt eorum exceſſum aliquis Juris feudorum Studioſus in Libros redegit ſine Delectu, ſine Methodo.* Vide Crag, de jure feud. 26, 27. Hanneton. de jur. feud. Lib. 1. Cap. 1.

(z) *Prima Feudorum Diviſio eſt in proprium & improprium, & hæc quidem præcipua & primaria diviſio eſt, a quâ reliquæ (licet alio reſpectu) dependent, & ad eam reducuntur.* Crag. de jur. feud. 51. Stry. Exam. jur. feud. Cap. 3. Q. 1, 2.

Under

Under the Head of *Feuda propria vel recta*, they treat of the Nature and Qualities of a *pure original Feud* (a), and under the Head of *Feuda Impropria & Degenerantia*, they treat of all *limited* or *qualified Feuds*, any way deviating from (b) the Simplicity of an *original* FEUD: And tho' this Diviſion doth in Truth comprehend and take in all Kinds of FEUDS, yet the Feudiſts have ſubdivided them into ſeveral Species (c), ſuggeſting by various Additions, the Dignity or Privileges of the FEUD; its Continuance or Courſe of Succeſſion,

(a) *In quo nullibi a communibus juris feudalis regulis receditur, ſed naturalia ſua ubique ſalva nec ulla pactione reſtricta retinet.* Stry. Exam. jur feud. Cap. 3. Q. 3.

(b) *Feudum Improprium eſt quod a propria Feudi natura recedit ex pacto & conventione contrahentium.* Stry. Exam. jur. feud. Cap. 4. Q. 1. *Improprium id Feudum dicitur Quod a naturali feudi Qualitate declinat, & quod pacto & conditionibus vel obſequiis nominatim eſt alligatum, contraque innatas Feudi Qualitates impropriatur.* Crag. de jur. feud. 51. Zaſius in uſus feud. 112, 113.

(c) *Feudum vel ab effectu vel aliqua cauſa efficienti vel formali in multas ſpecies dividitur.* Cowel. Inſ. Lib. 1. Tit. 2. Sect. 5,—12. *Quam diverſa Feudorum ſit natura, colligi poteſt ex eo quod a nonnullis juris Feudalis Doctoribus* 110 *Feudorum genera enumerentur.* Beuſt. Com. ad Stry. Exam. jur. feud. 47.

or the Qualifications and Condition of the Feudatary, or his Manner of acquiring it, or otherwiſe expreſſing ſome Quality ſuperadded to, or intrenching upon the Purity and Simplicity of a proper genuine FEUD. In one or other of theſe Views, the Reader will readily apprehend the moſt uſual Diviſions or Diſtinctions of FEUDS, as *Feudum Nobile* (d) & *Ignobile* (e), *Ligium* (f) & *non Ligi-*

(d) *Nobile feudum vocant in jure quod a principe qui ſuperiorem non agnoſcit conceditur———Cum dignitate & juriſdictione.*———Crag. de jure feud. 56. *Et quod poſſeſſorem ſuum nobilitat, vel eum qui prius erat, nobilem oſtendit.* Zaſius in uſus feud. fol. 5.

(e) *Ignobile, quod a minimis Valvaſoribus vel etiam a plebe paganis—in feudum conceditur.* Zaſius in uſus feud. fol. 5.—*Quod alias vocatur Feudum Burgenſe.* Stry. Exam. jur. feud. Cap. 3. Q. 36, 37. So that in Truth (as Sir *Henry Spelman* ſays) *Feudum ignobile nobili opponitur, & proprie dicitur quod ignobilibus & Ruſticis competit, nullo Feudali privilegio ornatum:*—*Quod*—*Nos Soccagium dicimus*—*Nonnulli Burgenſe vocant.* Vide Spelman and Du Freſne Gloſſ. ad verb. Feodum & Feudum.

(f) *Quod a Principe ſuperiorem non agnoſcente confertur Feudum Ligium dicitur.* Crag. de jur. feud. 79. *Quando Vaſallus Domino fidelitatem contra omnes ſine exceptione promittit.* Stry. Exam. jur. feud. Cap. 3. Q. 40. *Et talis fidelitas ei tantum debetur, Qui ſuperiorem non agnoſcit.* Crag. de jure feud. 57. Seld. Tit. of Honor, 38, 39.

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um (g), *Francum* (h) & *non Francum*, *Reale* & *perſonale*, *vel perpetuum* & *temporale* (i), *Eccleſiaſticum* (k) & *ſeculare* (l) *Antiquum ſeu Paternum* (m) & *Novum* (n), *Dividuum* & *Individuum*

(g) *Quod de alio quam de principe tenetur, feudum non Ligium (dicitur).* Crag. de jure feud. 79. *Et in quo ſemper excipitur perſona primi Domini.* Crag. ibid. 57. *Quando Vaſallus non indiſtincte ſed hoc vel illo excepto ad fidelitatem Domino præſtandam ſe obligat.* Stry. Exam. jur. feud. Cap. 3. Q. 42.

(h) *Quod ab omni ſervitio liberum eſt, cujus rara aut potius nulla in ipſo textu mentio fit, frequens tamen apud Doctores.* Crag. de jure feud. 52. Stry. Exam. jure feud. Cap. 4. Q. 30. Vide *Loyſeau's* Account of the Original of Franc Fiefs. *Loyſeau Traite des Seigneuries fol.* 15.

(i) Crag. de jure feud. 53. Zaſius in uſus feud. 5.

(k) *Eccleſiaſticum dicitur triplici reſpectu, tum quod ab Eccleſia datur, tum quod ab ea recipitur, et tertio quod datur & recipitur a Clerico, Licet non tanquam ab Eccleſia.* Zaſius in uſus feud. fol. 6.——*Et quod in re Eccleſiæ conſtituitur.* Stry. Exam. jur. feud. Cap. 3. Q. 24. Vide Crag. de jure feud. fol. 55.

(l) *Quod a ſecularibus datur & recipitur.* Zaſius in uſus feud. fol. 6.——*Et quod in re ſeculari conſtituitur.* Stry. Exam. jur. feud. Cap. 3. Q. 25.

(m) *Paternum ſive antiquum feudum id dicitur, in quo quis patri, avo aut alicui majorum ſuccedit.* Crag. de jur. feud. fol. 55. *Quod jure ſucceſſionis ad aliquem devolutum.* (Stry. Exam. jur. feud. Cap. 3. Q. 9.) *Quicunque ex Superioribus id acquiſivit.* Feud. Lib. 2. Tit. 50.

(n) *Quod de novo acquiſitum fuit, & habet initium in perſona Inveſtiti, nec a Progenitorum ſucceſſione provenit.* Zaſius in uſus feud. fol. 6. Crag. de jure feud. fol. 55. Hanneton. de jure feud. 30. Stry. Exam. jur. feud. Cap. 3. Q. 12.

As

duum (o), *Maſculinum* (p) & *Fœmineum* (q). Theſe Diviſions or Diſtinctions of FEUDS thus hinted, need not be particularly conſidered; becauſe I ſhall, under the Heads of *proper* and *improper*, have Opportunity to ſuggeſt ſo much of the Nature, and ſuch of the Qualities, of FEUDS in general, as will ſufficiently evidence and explain the great Diffi-

As this Diviſion is the Foundation of the Diſtinction, and Differences taken in our Law, between Eſtates by Diſcent and by Purchaſe, and I ſhall have little Occaſion hereafter to conſider it in this View; I ſhall here give the Reader the feudal Notion of it in *Zaſius* his Words, *(viz.) Feudum ſive ſit antiquum ſive novum dum nihil aliud accedat, a feudi recti natura non recedit; Licet Qualitates inter ſeſe differant, quod nova dicuntur et paterna, & quod alterum in ſucceſſione eſt potentius, quia ad agnatos protenditur, alterum infirmius quod ad latera non porrigitur,* Zaſius in uſus feud. fol. 124. *In jure enim Deſcendentes tantummodo ſuccedunt in feudo novo, itaque feudum novum ad Collaterales ex parte patris nunquam pertinebit, cum in feudo antiquo etiam Collaterales ſuccedant.* Crag. de jure feud. fol. 55.

(o) *Feudum Dividuum vel Diviſibile id dicitur quod in partes dividi poteſt, & Individuum vel Indiviſibile quod in partes diviſionem non admittit.* Crag. de jure feud. 58. Zouchei deſcript. Jur. temp. par. 2. Sect. 2.

(p) *Quod ad maſculos tantum tranſit, Quod in feudo regulare eſt.* Zaſius in uſus feud. fol. 6.

(q) *Quod vel a fœmina deſcendit vel in quod fœminæ ſuccedunt.* Crag. de jure feud. fol. 52. *Quod ad fœminas extenditur.* Zaſius in uſus feud. fol. 120.

culties,

culties, and the Reaſon of our *Engliſh Tenures.*

Firſt then, *proper* FEUDS are ſuch, and ſuch only as are purely military (r), and at this Time hereditary (ſ), and ſuch as in all Reſpects preſerve the Nature of an *original* FEUD, that is to ſay, ſuch as are *militiæ gratiâ* generouſly given without Price (t) or Stipulation to Perſons duely qualified for military Service, the requiſite Renders or rather Obligations, as ſocial Duties, reſulting from the Na-

(r) Vide ſupra, p. 5, 19.

(ſ) Though all Feuds were originally precarious *(ut ſupra* 19.) *Et hæreditarium eſſe* (ſays *Strykius) hoc facti eſt & contra naturam feudi.* Stry. Exam. jur. feud. Cap. 4. Q. 52. Yet now ſuch only as are perpetual, are conſidered as proper Feuds; *recti autem Feudi natura hæc eſt, quod ad Hæredes tranſitorium ſit in Infinitum.* Zaſius in uſus feud. 112. *In jure Longobardico & Alamanico proprium ac rectum illud* (Feudum ſcilicet) *tantum dicitur, quod pro arbitrio auferri nequit, ſed tranſmittitur.* Schilt. Com. ad Jus feud. Alaman. p. 11. Vide Feud. Lib. 1. Tit. 1. & ibid. in Marg. num. 46, 47. Crag. de jure Feud. 46, 53. & Spelm. Poſthum. Treatiſe of Feuds 5, 6.

(t) *Rectum feudum gratis concedi debet.* Hanneton. ſic de jur. feud. 20.—*In feudo nativo & genuino pretium non admittitur, nec merces, aut quid aliud niſi militaris opera.* Vide Crag. de jure feud. fol. 42, 49, 125. *Ex gratia & gratuito Domini beneficio Originem ſumpſit* (feudum ſcilicet rectum). Zaſius in uſus feud. 112.

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ture and Deſign of a Feudal Confederacy (u), being properly uncertain (w) and emergent as the Occaſions of War and Defence.

It was the military Nature of theſe FEUDS, that firſt rendered *Women* (x) and *Monks* (y) incapable of receiving or

(u) Vide ſupra p. 7. &c.

(w) *Feudorum natura eſt, ut Incerta ſint ſervitia.* Zaſius in uſus feud. 114. *Recti feudi natura eſt, quod Vaſallus fidelitatis ſacramento ad Incerta ſervitia obſtringatur.* Ibid. 112.

(x) *Natura ab omni feudo fœminas ſecludere videtur, quaſi ad obſequia Domini quæ vel in conſulendo vel in militando conſiſtunt, quorum præcipue cauſa Feuda conſtituuntur, Impares & ineptas.* Crag. de jure feud. 48, 50. *Fœmina ab omni feudo tanquam inutilis ſive inhabilis excluditur — neque enim ad munera militaria pro quibus ſolis feuda dabantur, earum opera Dominus uti poteſt: Nec arma tractare norunt, quod proprium eſt Vaſallorum: Neque in conſilia Domini admitti Mulier poteſt, cum quæ audit reticere neſciat.* Ibidem 236. *Fœminæ enim regulariter feudorum capaces non ſunt, utpote ad ſervitia inhabiles.* Stry. Exam. jur. feud. Cap. 4. Q. 4. Cap. 15. Q. 3.

(y) *Qui Clericus efficitur aut votum Religionis aſſumit, hoc ipſo feudum amittit.* Feud. Lib. 2. Tit. 26, 30. *Eo quod deſiit eſſe Miles ſæculi, qui factus eſt Miles Chriſti ——Nec beneficium pertinet ad eum qui non debet gerere officium.* Feud. Lib. 2. Tit. 21, 109. And the Law was the ſame in *England* while Monkery prevailed here; but an *Engliſhman* profeſſed abroad was always, and is now capable in *England*, (2 *Roll's Abr.* 43. *C.* 1 *Inſt.* 132. *b.*) and this was the better Opinion in Sir *Lawrence Anderton's* Caſe, debated 12 *Dec.* 1722. at *Serjeants Inn* in *Fleet-ſtreet*,

or ſucceeding to FEUDS of this Sort; and it was in Conſequence of the military Relation ariſing between the Givers and Receivers of ſuch FEUDS, and of the obvious Inducements to the Superior or Lord, to confer ſuch FEUD on this or that particular Perſon, (which were the military Qualifications and Ability of the Perſon) that the Feudatary could not alien the FEUD without the Conſent of the Lord (z); and as he could not alien, ſo neither could he exchange (a), pledge, mortgage, or otherwiſe ſubject it to his Debts (b), and by ſuch, or

ſtreet, upon an Appeal from the Commiſſioners of the forfeited Eſtates, notwithſtanding it appeared by his own Confeſſion, that he had been a *Benedictine* Monk fourteen Years in *France*.

(z) Vide Feud. Lib. 1. Tit. 13, 21. Lib. 2. Tit. 9, 34, 38, 44, 52, 55. Crag. de jure feud. fol. 339. Lindenb. Coll. legum antiq. inter LL. Longobard. Lib. 3. Tit. 3. Sect. 9. Zaſius in uſus feud. fol. 68, 69.

(a) *Alienationis nomine comprehenditur permutatio.* Crag. de jure feud. fol. 340, *nec permutari feudum poſſit.* Ibid. fol. 68, 69.

(b) *Feuda non poſſunt ullo pacto alienari per Vaſallos, nec in totum, nec in partem quocunque titulo ſive pigneris, Venditionis, ſive in Animæ ſalutem, ſeu ullo prorſus diſtractionis genere——nec in ſolutum dari feu-*

dum

or by any other Means put it into the Hands of a Stranger. And as the Feudatary could not alien the FEUD without the Conſent of the Lord, ſo neither could the Lord alien or tranſfer his *Seigniory* or Superiority to another, without the Conſent of his Feudatary (c), for the Obligations of the Superior and Inferior, being mutual and reciprocal (d), the Feudatary was really altogether as much intereſted in the Conduct and Ability of the Lord, as the Lord was in the Qualifications and Ability of his Feudatary: And as the Lord could not alien, ſo

dum poſſit. Zaſius in uſus feud. fol. 69. *Vaſallus feudum ſuum ſine Domini conſenſu oppignorare aut Hypothecare non poteſt.* Crag. de jure feud. fol. 343. Vide Feud. Lib. 2. Tit. 8, 55. Schilt. Cod. jur. Alaman. Cap. 26. & Com. adinde p. 179, 180.

(c) *Ex eadem Lege deſcendit quod Dominus ſine voluntate Vaſalli feudum alienare non poteſt.* Feud. Lib. 2. Tit. 34. Sect. 1. *Ex jure feudali non minus Dominus prohibetur ab alienatione ſui Dominii directi ſine conſenſu ſui Vaſalli, quam Vaſallus ab alienatione feudi, & utroque caſu pari pœna & hic & ille punitur, ille amiſſione directi Dominii, hic, Utilis.* Crag. de jure feud. fol. 129, 374, 375. Vide Feud. Lib. 1. Tit. 22. Zaſius in uſus feud. fol. 44, 70. Stry. Exam. jur. feud. Cap. 19. Q. 16.

(d) Vide ſupra p. 12. Note (a).

neither could he exchange, mortgage or otherwiſe diſpoſe of his Seigniory, without the Conſent of his Vaſſal (e). Again, as the Vaſſal or Feudatary could not alien, ſo neither could he deviſe or diſpoſe of the FEUD by *Will* (f), or by any means (when FEUDS were become hereditary) prevent or vary the feudal Courſe of Succeſſion, which in all *proper* FEUDS belonged to the Sons only (g), (excluſive of Daughters) and to them equally (h): Until by a Conſtitution of the Emperor *Frederick*, *Honorary* FEUDS be-

(e) *Omnibus modis prohibemus, ut nullus Senior de beneficio ſuorum militum, Cambium aut Precarium aut Libellum ſine eorum adſenſu facere præſumat.* Conſtitut. Conradi feud. Lib. 5. Tit. 1. Lindenb. Coll. LL. antiq. inter LL. Longobard. Lib. 3. Tit. 8. Sect. 4.

(f) *Certi juris eſt, neque Feuda teſtamento relinqui, aut Hæredi vero Teſtamento præjudicari poſſe, ratio eſt, quod feudum non tam a Vaſallo teſtante quam a Domino Legem capiat——Extranei Hæredis Inſtitutio eſt quaſi alienatio.* Crag. de jure feud. fol. 131, 340. *Nulla ordinatione defuncti in feudo manente vel valente.* Feud. Lib. 1. Tit. 8. Sect. 1.

(g) *Succedunt Tantum filii.* Feud. Lib. 1. Tit. 8. And *Crag.* reckons it among the *Naturalia feudorum* that *maſculi tantum Hæredes ſuccedant.* Crag. de jure feud. fol. 48, 50.

(h) Feud. Lib. 1. Tit. 8. Schilt. de nat. Succeſſion. feud. p. 6.

came

came Indiviſible (i), and as ſuch they, and in Imitation of them *military* FEUDS in moſt Countries, began to deſcend to the eldeſt Son only (k).

Secondly, Under the Head of *Improper* FEUDS, the feudal Writers conſider every FEUD (that is to ſay) every Eſtate, howſoever acquired or poſſeſſed upon Terms of *Fealty*, that doth not in Point of Acquiſition, Service, Acknowledgment, Succeſſion and the like, ſtrictly conform to the Deſign and Nature of a *proper military* FEUD: All FEUDS therefore that are ſold or bartered for any immediate or contracted Equivalent (l), or that are granted Free of all Service (m), or in Con-

(i) *Ducatus, Marchia, Comitatus de cætero non dividatur.* Feud. Lib. 2. Tit. 55. Sect. 1.

(k) *Primævo feudali jure hanc de Majoratu ſeu Senioratu obtinuiſſe regulam, ut regulariter Senior fratrum Et Reliquos fratres a ſucceſſione excluderet.* Schilt. Com. ad Cod. jur. Alaman. p. 327.

(l) Vide ſupra p. 27.

(m) Such *Feud*, though it ſeems to retain little or nothing of the Nature of a *Feud*, is notwithſtanding an *improper Feud*, *Et cenſebitur jure feudi in omnibus, præterquam in ſervitii præſtatione, nam iiſdem cauſis ac delictis amittitur, ſicut alia feuda excepto ſervitio, quod*

Conſideration of one or more *certain* Services (n), (whether military or not military) or upon a *Cens* or *Rent* in Lieu of Service; and all ſuch FEUDS, as are by expreſs Words, in their Creation or Conſtitution, alienable, or allowed to deſcend indifferently to Males or Females, are *improper* FEUDS, and are ſeverally treated of by the Feudiſts under the Heads of

quod ex pacto non debet. Feud. Lib. 2. Tit. 23. Num. 43. in Marg.

Licet Francum Feudum expreſſe ab omnibus ſervitiis ſit immune, non tamen a maleficiis, quæ aut in faciendo aut in celando conſiſtunt, Vaſallum liberat———Hinc fit ut apud nos (ſcilicet Scotos) *non minus in franco feudo quam in aliis, pœnæ feloniæ, purpreſturæ, & delictorum quæ his ſunt ſimilia, locum habent: Non autem Recognitio ob alienationem majoris partis, cum hæc Alienatio delictum conjunctum non habeat.* Crag. de jure feud. 52. Note however that, though this Power of aliening ſuch Feud, may be agreeable to the Cuſtoms of *Scotland*, yet according to *Zaſius*, *Feudum francum inconſulto Domino alienari non poſſit*; *Quia ſi delinqueret* (Vaſallus) *puniri non poſſit, cum eſſet ei facultas Feudi alienandi.* Zaſius in uſus feud. 123.

(n) *Feuda ad certa ſervitia data, ut Vaſallus Dominum comitetur, eum expectet, ſerviat, & ſimiles operas præſtet, impropria Feuda dicuntur, quia feudorum natura eſt, ut incerta ſint ſervitia.* Zaſius in uſus feud. 114. Crag. de jure feud. 46, 48. Feud. Lib. 2. Tit. 51. Sect. 7. Stry. Exam. jur. feud. Cap. 4. Q. 29.

Feuda Emtitia (o), *Franca* (p), *Cenſualia* vel *Emphiteutica* (q), *Alienabilia* (r) & *Fœminina* (ſ), &c.

It would be a wild and fruitleſs Attempt to treat diſtinctly of the ſeveral Kinds of FEUDS of this Nature; eſpecially ſince there are no two Syſtems or Countries (t) that agree in all Points concerning them: So that I muſt refer ſuch Perſons as are curious, to thoſe Authors who have already wrote of them, and ſhall content my ſelf to advertiſe the Reader of theſe five Things only concerning them.

(o) Zaſius in uſus feud. 116, 117. Stry. Exam. jur. feud. Cap. 4. Q. 13, 14.

(p) Vide ſupra p. 25, 32, 33. *in Marg.*

(q) *Feudum cenſuale eſt ubi Vaſallus prædium ſub promiſſione fidei accipit, ut loco ſervitiorum certum cenſum vel penſionem quotannis præſtat.* Stry. Exam. jur. feud. Cap. 4. Q. 35. Schilt. Com. ad Cod. jur. Alaman. 197, 391, 392.

(r) *Feudum alienabile eſt, quod alicui hac ratione conceditur, ut Vaſallus idem in quemcunque alienare vel transferre poſſit, quod contra propriam Feudi naturam eſt.* Stry. Exam. jur. feud. Cap. 4. Q. 53. Zaſius in uſus feud. 119.

(ſ) Vide ſupra p. 26, 28.

(t) *Jus feudale a ſeipſo pro diverſitate locorum & Regionum in quibus uſurpatur differt.* Crag. de jure feud. 233.

I. That *Fealty*, the eſſential feudal Bond, is ſo neceſſary to the very Notion of a FEUD, that it is a downright Contradiction to ſuppoſe the moſt improper FEUD to ſubſiſt without it (u); but the other Obligations or Properties of an original FEUD, may be qualified, or varied by the *Tenor* or expreſs Terms of the feudal Donation.

(u) *Fidelitas non ſolum vinculum eſt feudi ſed vera ejus eſſentia, ſine qua nullum Feudum ſubſiſtere poſſit, adeo ut fidelitas ipſa ne pacto quidem remitti poſſit, alioqui in aliam contractus ſpeciem tranſit, nempe in allodium.* Crag. de jure feud. 45, 46, 47. Stry. Exam. jur. feud. Cap. 2. Q. 23. ——*De omni feodo fidelitas præſtanda eſt, ſive ſit militare, ſive Francum, ſive Emphyteuticum aut ad Libellum datum.* Crag. ibid. 223. *Quia fidelitas remitti non poteſt.* Zaſius in uſus feud. 122. Agreeably hereunto the Lord *Coke* ſays, (1 *Inſt.* 129. *a.*) That *Ligeantia eſt vinculum fidei, Ligeantia eſt Legis eſſentia.* And Mr. *Selden* declares, that without the Bond of *Homage* or *Fealty*, no Poſſeſſion (though it pay Rent or other Satisfaction, upon any Contract either cenſual, Emphiteuticary or the like) can be a Feud. *Seld. Title of Honor, fol.* 273. And therefore the Book of Feuds ſaying (*Lib.* 2. *Tit.* 24.) that *ſunt quædam feuda ita data, ut pro his fidelitas non ſit præſtanda*, muſt be underſtood *De juramento fidelitatis*, and not of Fealty in general, as appears from the ſame Book, *Tit.* 3, 76. and *Crag. de jure feud.* 47.

II. That a FEUD is always preſumed to be a *proper* FEUD, unleſs it appears *ex verbis Inveſtituræ* to be otherwiſe (w).

III. That *improper* FEUDS are diſtinguiſhed from *proper* FEUDS by ſuch Qualities only, as are varied or ſuperadded to the FEUD by expreſs Proviſion of the Parties, and that they in all other Reſpects retain the Nature of an *original* FEUD (x).

IV. That in the Conſideration of *improper* FEUDS, of which Sort moſt FEUDS are at this Day, not only the Terms contracted, but the Cuſtom of

(w) *Illud ſemper mente tenendum quod ſemper præſumatur feudum proprium, niſi mutatam eſſe ejus naturam ex verbis Inveſtituræ conſtet.* Crag. de jure feud. 52. *Probari neceſſe eſt, Feuda eſſe non recta, cum in dubio feudum ſimplex & rectum eſſe præſumatur.* Zaſius in uſus feud. 113. Stry. Exam. jur. feud. Cap. 3. Q. 6.

(x) *Recepti juris eſt quod licet feuda in aliquibus contra naturam feudalem concedantur, in reliquis tamen vel Capitulis vel placitis, quæ non ſunt alterata, Feudum in recta natura & ſimplici remanet.* Zaſius in uſus feud. 113——*Eatenus tantum degenerantia dicuntur* (Feuda) *quatenus pacto immutantur, in reliquis feudi proprii naturam ſervant.* Crag. de jur. feud. 48.

the

the Country, where the FEUD lies, is to be nicely obſerved (y).

V. That *Inveſtiture*, that is to ſay, the Solemnity, by which the Vaſſal or feudal Tenant is inducted or admitted to a FEUD, is altogether as neceſſary to an *improper*, as to a *proper* FEUD (z).

Having gone thus far into the Nature and Learning of FEUDS, it may be expected from me before I cloſe this Part of my Deſign, that I ſhould conſider the ſeveral Obligations ariſing between a feudal Lord and his Vaſſal or Tenant, in reſpect of this Policy, and of the feudal Relation between them: But as the feudal Writers are very co-

(y) *Mos Regionis non minus dat Legem feudo quam tenor.* Crag. de jure feud. 50.——*Dupliciter conſideratur natura feudi, aliqua eſt, quæ ex ſcriptis conſtat uſibus*——*Quædam quæ ex moribus, uſuve cujuſque Provinciæ obſervatis recepta eſt; Feuda enim quam maxime conſuetudine conſtare ſæpe diximus.* Zaſius in uſus feud. 123.

(z) *Sciendum eſt feudum ſine Inveſtitura nullo modo conſtitui poſſe.* Feud. Lib. 1. Tit. 25. Lib. 2. Tit. 1, 2. Vide Crag. de jure feud. Lib. 2. Dieg. 2. fol. 132.

pious upon this Head (a), and few of the feudal Obligations are, as ſuch, of Force with us, I ſhall only take Notice of the Obligations relating to *Eviction* and *Aid*, and of thoſe, meerly becauſe our Laws of *Warranty* and *Aid* may be ſuppoſed to depend upon them.

I. The feudal Obligation upon *Eviction*, *ut vel Feudum aliud ejuſdem bonitatis reſtituat Dominus vel eſtimationem præſtet* (b), if conſidered as a Penalty upon the Lord, for refuſing or neglecting, when required (c), to protect or defend his Feudatary's Title to the FEUD or *Fee*, might be always reaſonable: But it is much to be queſtioned, whether the Lord's Obligation to protect or defend his Feudatary, made him anciently liable

(a) Crag. de jure feud. Lib. 2. Dieg. 11. Hanneton. de jur. feud. Lib. 1. Cap. 11, 12. Stry. Exam. jur. feud. Cap. 18. Zaſius in uſus feud. Cap. 7.

(b) Vide Stry. Exam. jur. feud. Cap. 24. Q. 23. Feud. Lib. 2. Tit. 8. 25.

(c) Vide feud. Lib. 2. Tit. 25.

upon

upon Eviction (without any Fraud or Defect in him) to compenſate the Loſs of the FEUD; inaſmuch as it can hardly be imagined that, while FEUDS were precarious and held at the Will of the Lord, or indeed that, while they were generouſly given without Price or ſtipulated Render, the Lord ſhould be ſubject to ſuch Loſs (d); eſpecially ſince it is not unlikely, that the Lord's Obligation upon Eviction, rather prevailed upon the Reaſon of *contracted* and *improper* FEUDS, than from the Nature of a *pure original* FEUD: It ſeeming as to them highly reaſonable that, if a Price was paid, or an Equivalent of any Kind ſtipulated or contracted for, the Feudatary ſhould have his Bargain, and that, if the FEUD was evicted as the FEUD or *Propriety* of another, the Lord

(d) *Varrantizationis quam dicimus, ſive de evictione actionis vis omnis a diſpoſitione pendet, nam ſi feudum ex titulo puræ donationis procedat, vix locus eſt varrantizationi, Iniquum enim videretur, qui ex ſua Liberalitate quid conceſſerint, ut in id teneantur, quod non habent, ſi non tamen aliquid vel dolo, vel arte fecerint, quo minus feudum ad Vaſallum tranſeat.* Crag. de jur. feud. 152.

ſhould anſwer the Loſs, and make the Party amends (e). And though none of the ancient Feudiſts make any ſuch Diſtinction; but all of them ſuppoſe the Lord's Obligation upon Eviction to have been general (f), yet they muſt be underſtood to ſpeak of the Times in which they wrote, when *improper* FEUDS chiefly prevailed; nay, when almoſt all FEUDS were alienable and Saleable as Matters of Merchandiſe.

II. *Aid*, in the Senſe wherein it is underſtood at this Day (in moſt Places where the feudal Law prevails)

(e) Vide Crag. ibid. & fol. 146.

(f) *Feudiſtæ tamen omnes Dominum feudi Vaſallo de Evictione teneri volunt.* Crag. ibid.———

Generaliter verum eſt in Feudis, Dominos de Evictionibus teneri. Feud. Lib. 2. Tit. 80. But *Glanvil* makes the following Diſtinction, *viz. Si aliquis alicui donaverit aliquod Tenementum pro ſervitio & Homagio ſuo, quod poſtea alius verſus eum dirationaverit, tenebitur quidem Dominus tenementum id ei warrantizare, vel competens Eſcambium ei reddere. Secus eſt tamen de eo, qui de alio tenet feodum ſuum ſicut Hæreditatem ſuam, & unde fecerit Homagium, quia licet terram illam amittat; non tenebitur ei Dominus ad Eſcambium.* Glanvil. Lib. 9. Cap. 4. p. 70.

to import an Obligation upon the feudal Tenant, to contribute to the private Neceſſities or Occaſions of the Lord, was not of direct feudal Obligation (g); inaſmuch as the original *feudal Aid* ſeems to have been purely military, binding the Feudatary merely to concur with, and to aſſiſt his Superior or Lord in Defence of the FEUD or *feudal Society* (h); and if the genuine *feudal Aid* was of this Nature only, it can hardly be made out, that the ſeveral different *Aids*, which have been exacted, and taken by feudal Lords, for many Ages, in moſt Parts of *Europe* (i), are to be inferred

(g) *Quæſitum eſt ſi Dominus in perjurium incidat, quia dare non valeat quod dare juraverat, & Vaſallus eum liberare poſſit ſuam pecuniam dando & non faciat, an Beneficium amittat? Et Reſponſum eſt non amittere.* Feud. Lib. 2. Tit. 26. Sect. 5.——*Alere inopem Dominum aut eum Cuſtodia ſeu Carcere Liberare, num Vaſallus cogitur? non cogitur, niſi juvandi Vaſalli cauſa Dominus bona ſua conſumpſerit, vel niſi maximum ſit Feudum, vel niſi de omnibus Vaſallum inveſtivit, verum id Utilius fuerit initio ſtipulari.* Ibid. Num. 27. in Marg. & Zaſius in uſus feud. fol. 42, 43. But the Text makes no ſuch Exceptions or Diſtinctions.

(h) Vide ſupra, p. 6,——10.

(i) Vide Du Freſne Gloſſ. ad Verb. Auxilium. Conſtitut. Sicul. & Neapolitan. Lib. 3. Tit. 18, 19. Zaſius in uſus

ferred from the Reaſon of FEUDS, or that they do not altogether depend upon the Uſage or Cuſtom of the ſeveral Countries (k) where they are eſtabliſhed; ſo that I ſhall not conſider them here as direct feudal Conſequences; but ſhall hereafter (l) conſider them ſo far only, as they concern us.

Though theſe Notices relating to *Eviction* and *Aid* may, with Regard to my preſent Deſign, ſuffice concerning the particular Obligations ariſing between a feudal Lord and his Vaſſal; yet it muſt be obſerved, that the feudal Obligations in general, how various ſoever they were,

uſus Feud. 42, 43. Hanneton. de jure Feud. Lib. 1. Cap. 10. p. 111, 116. Stry. Exam. jur. Feud. Cap. 18. Q. 34. &c. Crag. de jure feud. 213. Mad. Hiſt. of the Exchequer 396, 397.

(k) *Strykius*, ſpeaking of the Vaſſal's Contribution *ad dotandam filiam*, ſays that in *jure feudali hoc vix fundatum, ſed ex conſuetudine locorum id potius determinandum.* Stry. Exam. jur. feud. Cap. 18. Q. 38. And yet *Aids*, of all Kinds, may be underſtood, to fall within the Notion of *Fealty*, as it is explained in the Book of *Feuds*, viz. *Qui Domino ſuo fidelitatem jurat, iſta ſex in memoria ſemper habere debet, incolume, tutum, honeſtum, utile, facile, poſſibile.* Feud. Lib. 2. Tit. 6.

(l) Infra p. 105.

were

were equally inforced and exacted from both: It following from the Nature, as well as the Deſign of the feudal Relation, that the Duties of ſuch Relation, ſhould on both Sides be punctually and effectually anſwered: Inſomuch, that if the Vaſſal on the one Hand refuſed to do his *Fealty* (m), or failed to perform the Services of the FEUD (n), or did by any Means attempt to defeat or weaken the Foundation of the Relation between him and his Lord, by denying (o),

(m) *Si Dominus a Vaſallo petierit fidelitatem——— nec legitime requiſitus eam præſtare voluerit, tanquam ingratus feudum amittit.* Feud. Lib. 2. Tit. 24, 100.

(n) *Non eſt alia juſtior cauſa beneficii auferendi quam ſi id propter quod Beneficium datum fuerit, hoc ſervitium facere recuſaverit.* Feud. Lib. 2. Tit. 24. Zaſius in uſus feud. 83. Hanneton. de jure feud. Lib. 3. Cap. 10. p. 342. Crag. de jure feud. 365.

(o) *Vaſallus ſi Feudum vel Feudi partem aut Feudi conditionem ex certa ſcientia inficiatur, & inde convictus fuerit, eo quod abnegavit Feudum ejuſve conditionem, expoliabitur——— Vaſallus feudum quod ſciens abnegavit, amittit.* Feud. Lib. 2. Tit. 26.———*Si Vaſallus Domino ſuper Feudo vel ejus conditione conventus, feudum ſciens negaverit: Quia forte Feudum quod novum erat dicebat eſſe antiquum, vel rectum quod erat non rectum: Vel omnino rem feudalem eſſe negabat, tunc mendacii convictus feudo privabitur.* Zaſius in uſus feud. 90. Crag. de jure feud. 356. Hanneton. de jure feud. 338, 339. Feud. Lib. 2. Tit. 24. Sect. 3.

aliening

aliening (p), diſmembering or impairing (q) the FEUD; or in Truth, if he did any thing againſt his Fealty in general (r), to the Prejudice of his Lord, the Lord might reſume the FEUD (ſ). The Lord again on the other Hand was bound *pari pœna* to obſerve and comply with the Terms of Relation on his Part; inſomuch that if he neglected to protect or defend his Feudatary, or did any Thing that was prejudicial to him, or injurious to the feudal Relation, he loſt his *Seigniory* (t) or Intereſt in the FEUD; and thus the

(p) Vide ſupra p. 29. Zaſius in uſus feud. 79. Stry. Exam. jur. feud. Cap. 23. Q. 19.

(q) *Si Vaſallus feudum diſſipaverit, aut inſigni detriment deterius fecerit, privabitur.* Zaſius in uſus feud. 91. Crag de jure feud. 362.

(r) *Si contra ea quæ in fidelitate nominantur, fecerit* (Vaſallus) *Beneficio carebit.* Feud. Lib. 2. Tit. 97. Vide Feud. Lib. 2. Tit. 24. Sect. 2. & Lib. 5. Tit. 2. Zaſius in uſus feud. 83, 90, 93. Hanneton. de jure feud. Lib. 3. Cap. 11, 12. Crag. de jure feud. Lib. 3. Dieg. 5, 6. Stry. Exam. jur. feud. Cap. 23.

(ſ) Vide Feud. Lib. 2. Tit. 24. ad fin. & Tit. 98.

(t) *Ex omni Felonia (Ex omni offenſa.* Zaſius in uſus feud. 96. *ſive delicto.* Crag. de jure feud. 374. *Ex iiſdem cauſis, quibus.* Stry. Exam. jur. feud. Cap. 23. Q. 50.) *qua Vaſallus feudo privatur, & Dominus proprietate (directo ſuo Dominio.* Zaſius & Crag. ibid.) *privetur.* Feud. Lib. 2. Tit. 47. & ibid. Tit. 26. Sect. 5.

Note,

the Duties and Advantages of their Relation, which were reciprocal and equal, were duly inforced at the Peril of their ſeveral Intereſts.

Note, That *Felonia vel Fallonia (quaſi a fallendo.* Stry. Exam. jur. feud. Cap. 23. Q. 2. Du Freſne Gloſſ. ad verb. Felonia.) *Eſt culpa ſeu injuria (delictum vel perfidia.* Zaſius in uſus feud. fol. 8. Stry. ibid. Q. 1.) *propter quam vaſallus amittit feudum.* Spelm. Gloſſ. ad verba Felonia & Fallonia.

CHAP.

CHAP. II.

Of the Eſtabliſhment of Feuds in England

IT is difficult to determine preciſely the Time, when FEUDS or *Tenures* were firſt brought into *England*; ſome have thought that they were planted here long before the *Conqueſt*, others that they were introduced by *William* I. ſoon after; the Authorities on both Sides of this Queſtion are numerous, and therefore, though as mere Authorities, they can have little Weight; yet I ſhall mention the principal Perſons who have differed on this Point, that the Reader may ſee, that bare Authority ought to have little or no Influence on his Judgment of this Queſtion, and that he may in this Caſe, without Vanity or Danger of Cenſure, lean unto his own Underſtanding.

The

The Lord *Coke*, (a), the Judges of *Ireland* in the Caſe of Tenures (b), Mr. *Selden* (c), *Nathaniel Bacon*

(a) The Lord *Coke* ſays, that the Tenure by Knight-Service—is of great Antiquity——And that it drew to it *Ward*, *Marriage*, and *Relief*, in the Time of King *Alfred*. (1 *Inſt.* 76. *b.*) And in the Preface to his 3 *Rep.* He ſuppoſes that the *Redditiones Socharum & Regis Servitium*, ſaid in the Book of *Domeſday*, *a Conſtitutione antiquorum Temporum*, to belong to the Church of *Worceſter*, within the Hundred of *Oſwaldſhaw*, prove *Socage Tenure*, and *Knight-Service*, long before the Conqueſt.

(b) They ſuppoſe that the *Thani Majores*, or *Thani Regis* among the *Saxons*, were the King's immediate Tenants of Lands, which they held by perſonal Service, as of the King's Perſon by *Grand Serjeanty*, or *Knight-Service in Capite*; and that the Land ſo held, was in thoſe Times called *Thaneland*, as Land holden in *Socage* was called *Reveland*——And that after ſome Years that followed the Coming of the *Normans*, the Title of *Thane* grew out of Uſe, and that of *Baron* and *Barony* ſucceeded for *Thane*, and *Thainland*——They therefore concluding Sir *Hen. Spelman* miſtaken, who in his Gloſſary, *Verbo Feudum*, refers the Original of *Feuds* in *England* to the *Norman* Conqueſt, ſay, that it is moſt manifeſt, that *Capite* Tenures, Tenures by Knight-Service, Tenures in *Socage*, &c. were frequent in the Times of the *Saxons*, but that indeed the Poſſeſſions of *Biſhops* and *Abbots*, were firſt made ſubject to Knight-Service *in Capite* by *William* the Conqueror, in the fourth Year of his Reign, &c. See *the Caſe of Tenures upon the Commiſſion of defective Titles*, &c. 8°. printed at *London* 1720. or the Subſtance of the Caſe as to this Point, in Biſhop *Gibſon*'s Preface to *Spelman*'s Treatiſe of Feuds, &c.

(c) This Dignity, ſays Mr. *Selden*, ſpeaking of the Dignity of an *Earl*, was in ſome Places in *England* both *feudal*

con (d), and others (e), are of Opinion

feudal and inheritable, even from the Age of the firſt Coming of the *Saxons* into *England*, which is commonly placed in 448, of our Saviour, though by exacter Calculation it falls twenty Years ſooner.——And that *Ethelred*, *Ealdorman* of *Mercland*, had all that which was the Kingdom of *Mercland* to his own Uſe, as an *Earldom* and *Fief* given him in Marriage with *Ethelfled*, by her Father King *Alfred*, and to prove this, cites *William* of *Malmſbury de Geſt. Regum. Lib.* 2. *Cap.* 4. *Londonium caput Regni Merciorum cuidam Primario Ethelredo in Fidelitatem ſuam cum Filia Ethelfleda conceſſit.* Vide Seld. Tit. of Hon. 510, 511. He ſays indeed, *(ibid.)* that *Aſſerius* and *Florentius* have it *Servandum commendavit:* And if he had gone on, he would have found that *Will.* of *Malmeſbury* himſelf, in the very next Line, calls it *Commiſſum*, and afterwards *Cap.* 5. *Commendatum*, which Words rather ſuggeſt a *Truſt* than a *Feud. Vide Malmſ. de Geſt. Regum inter Scriptores poſt Bedam, fol.* 44, 46. and *Spelm. Poſthum. Treat. of Feuds* 13.

Mr. *Selden* likewiſe ſuppoſes the Names of *Thane* and *Vavaſor* in the *Saxon* Times to have been *feudal*, and that as *Earl*, *King's Thane*, and *middle Thane* ſucceeded one the other in the *Saxon* Laws, ſo *Count*, *Baron*, and *Vavaſor* are uſed as Interpreters of them in the *French* Laws of *William* I. and that the *King's Thanes* held of the King in chief by Knight-Service, and were of the ſame Kind with them, that were after the *Normans Honorary* or *Parliamentary Barons (Tit. of Hon.* 513.) and he ſays *(ibid.* 520.) that a *Vavaſor* was in the moſt antient Times only a Tenant by *Knight-Service:* that either held of a meſne Lord, and not immediately of the King, or at leaſt of the King as of an *Honour* or *Manor*, and not in *Chief.*

(d) Who thinks that it is not clear from any Author of Credit, that the *Normans* changed the Tenures of Lands ——And that none of them appeared to him to be of *Norman* Original, altho' they received their Names according to that Dialect. *Bacon. Hiſt. of the Eng. Gov.* 161.

(e) *Saltern* ſuppoſes Conveyances by *Feoffment* and *Livery* to have been before the Conqueſt and that there

nion, that *Tenures* were not brought into *England* by the *Conqueror*, but that they were common among the *Saxons*.

The Lord *Hale* (g), *Crag* (h), Mr.

there were *Lords* and *Tenants* in the Days of *Gorbonian* the Good, and that *Fealty* was ſworn to the Prince in the Time of *Elidurus*, which of Neceſſity (ſays he) were accompanied with Tenures, Services, Diſtreſſes, and the like. *Vide Saltern de antiquis Britan. Legibus Cap.* 8.

Sir *William Temple* ſays, that thoſe Authors, who will make the Conqueror to have broken or changed the Laws of *England*, and introduced thoſe of *Normandy*, pretend the Duty of *Eſcuage*, with the *Tenures* of *Knight-Service* and *Baronage*, came over in this Reign; but that it needs no Proof, that *thoſe*, with the *other feudal Laws*, were all brought into *Europe* by the ancient *Goths*, and by them ſettled in all the Provinces (which they conquered) of the *Roman Empire*, and among the Reſt by the *Saxons* in *England*, as well as by the *Franks* in *Gaul*, and the *Normans* in *Normandy*. *Temp. Introd. to the Hiſt. of Eng.* 171, 172. And the Author of the *Mirror* ſeems to imagine, that *Tenures* were ordained for the Defence of the Realm by our old Kings *before* the *Conqueſt*. *Vide Mir. Cap.* 1. *Sect.* 3. *p.* 11, 12.

(g) The Lord *Hale* mentions the Law touching *Knight Service*, as one of the Laws of *William* I., which were deſigned for the eſtabliſhment of him in the Throne, and for the ſecuring the Peace of the Kingdom (*Hiſt. of the Com. Law* 107) and he endeavours to ſhew (*ibid.* 223, 224.) That Tenures by *Knight Service*, were introduced in the Time of *William* I. with the *Conſent* of *Parliament*.

(h) *Anglos ante Conqueſtum vix puto*, (ſays *Crag*,) *hoc Jus* (ſcilicet Feudorum) *recepiſſe, rationes cur ita credam hæ ſunt*——*Scio ante Conqueſtum multas apud Anglos Leges ab Anglo-Saxonum Regibus ante conqueſ-*

Mr. *Somner* (i) Sir *Henry Spelman* (k) and

tum conſcriptas———*Nè veſtigium quidem Juris feudalis in eis pæne reperitur, nam licet vaſallorum in Dominos Ingratitudo, ſive Felonia expreſſe aliquo ſtatuto puniatur, Pœna tamen non eſt Amiſſio Feudi, ut in Jure Feudali, ſed tantum vel mulcta pecuniaria ſi parva ſit Injuria, vel pœna Capitis ſi Major, quæ Juris feudalis Naturam non ſapiunt*———*Præterea ex ipſo Polydoro, qui Anglorum Hiſtoriam conſcripſit diligentiſſime, conſtat manifeſte Conqueſtorem, cum omnia Angliæ prædia jure Belli ad ſe pertinere diceret, legem Agrariam tuliſſe, qua ſe omnium Poſſeſſionum Dominum declaravit (Quod nihil aliud erat quam omnia prædia de eo tanquam Domino teneri, &c.)* Vid. Crag. de jur. feud. 29.

(i) Before the Conqueſt, ſays Mr. *Somner*, we were not in this Kingdom acquainted with what ſince, and to this Day, we call *Feoda*, Foreigners *Feuda*, i. e. *Fiefs* or *Fees*, either in that general Senſe I mean, wherein they are diſcourſed of, and handled abroad in the Book thence intitled *De Feudis*, at Home in that called *Littleton's Tenures*. (*Treat. of Gav.* 100.) He proves this Aſſertion, (*ibid.* 100, 104.) and concludes, that to the *Conqueror* it is, that the Names and Cuſtoms of our *Engliſh Fees*, or (as we now vulgarly call them) *Tenures*, ſuch at leaſt as are Military, owe their Introduction.

(k) *Jus Feodale* (ſays Sir *H. Spelman*) *Anglis primus impoſuit Gulielmus Conqueſtor*, (Gloſſ. ad Mag. Chart. fol. 374.) and again, (*ad verbum Feodum*) *Feodorum ſervitutes in Britanniam noſtram primus invexit Gulielmus Senior Conqueſtor nuncupatus, Qui lege ea e Normannia introducta Angliam totam ſuis diviſit Commilitibus: Innuit hoc ipſum Codex ejus Agrarius*———(Qui) *Feudum & Normanniam jungit, ac ſi rei novæ Notitia e Normannia diſquirenda eſſet*———And it being ſaid by the Judges of *Ireland*, in the above-mentioned Caſe of Tenures, that Sir *H. Spelman*, thus referring the Original of Feuds in *England* to the *Norman* Conqueſt, was miſtaken; He wrote an elaborate Treatiſe of the Nature and Original of Feuds and Tenures in Support and Confirmation of his Opinion. This Treatiſe is publiſhed

 by

and others again (l), are of Opinion that FEUDS were brought hither by the *Conqueror*, and that they were in his Time firſt eſtabliſhed among us.

It would be tedious and hardly pertinent to my preſent Deſign, diſ-

by Biſhop *Gibſon* 1723, among the Poſthumous Works of this Great Man.

(l) *Mat. Paris*, (*Anno* 1068. *fol.* 6.) ſays, that *Will.* 1. *Commilitonibus ſuis, qui Bello Haſtingenſi Regionem ſecum ſubjugaverant, terras, Anglorum & Poſſeſſiones affluentiori Manu contulit, illudque parum quod remanſerat ſub Jugo poſuit perpetuæ ſervitutis.* And again, (*anno* 1070. *fol.* 7.) he ſays, that this King *Epiſcopatus quoq; & Abbatias omnes quæ Baronias tenebant, & eatenus ab omni ſervitute ſeculari Libertatem habuerant, ſub ſervitute ſtatuit Militari, irrotulans ſingulos Epiſcopatus & Abbatias pro voluntate ſua quot Milites ſibi & ſucceſſoribus ſuis Hoſtilitatis Tempore voluit a ſingulis Exhiberi: Et Rotulos hujus Eccleſiaſticæ ſervitutis ponens in Theſauris, multos viros Eccleſiaſticos huic Conſtitutioni peſſimæ reluctantes a Regno fugavit.*

Mr. *Camden* aſſerts, that the *Engliſh* were diſpoſſeſſed of their Hereditary Eſtates by *William* I. and the Lands and Farms divided among his Soldiers, but with this Reſerve, that he ſhould ſtill remain the *direct Proprietor*, and oblige them to do *Homage* to him and his Succeſſors, that is, (ſays he) that they ſhould hold them in *Fee*, but the King alone *Chief Lord*, and they *feudatory Lords*, and in actual Poſſeſſion.

Dr. *Hody* ſays, that *Baronies* and ſuch *Tenures* were firſt brought into *England* by the *Conqueror*, (*Hiſt. of Convoc.* 117.) and *Bracton*, ſpeaking of the *Regale Servitium*, intimates as much in theſe Words, *Secundum quod in Conqueſtu fuit adinventum.* Bract. Lib. 2. Cap. 16. Sect. 7. Vid. Dugd. Orig. Jurid. 6. Wilkins Leg. Anglo-Saxon. fo. 288, 289. Cottoni Poſthuma, 13, 14, 346.

tinctly to examine and conſider the Ground of theſe Opinions; and therefore I muſt refer the Reader to the Treatiſes in which they are advanced, and leave him upon due Conſideration to judge of them as he pleaſes: Taking only this Obſervation along with them, that it is very remarkable, That *William* I. about the twentieth Year of his Reign, juſt when the General *Survey* of *England*, called *Domeſday-Book*, is ſuppoſed to have been finiſhed (m), and not till then, ſummoned all the Great Men and Landholders in the Kingdom to

(m) *Ante Annum Gulielmi viceſimum, Deſcriptio hæc non eſt abſoluta, immo in eo facta; Teſtis eſt omni exceptione longe Major voluminum eorum in quæ referebatur, Alterum & Minus quo ſeorſim cenſitæ ſunt Eſſexia, Norfolcia, & Suffolcia, In hujus calce Literis Majuſculis, nec ipſa Deſcriptione recentioribus, adjectum eſt.*

ANNO MILLESIMO OCTOGESIMO SEXTO AB INCARNATIONE DOMINI, VIGESIMO VERO REGIS WILLIELMI, FACTA EST ISTA DESCRIPTIO, NON SOLUM PER HOS TRES COMITATUS SED ETIAM PER ALIOS. Seld. præf. ad Eadmer. fol. 5.——The Lord *Hale* and Mr. *Madox*, agree with Mr. *Selden*'s Account of this Matter, and *Tho. Wikes*, and *Walter Hemingford* in their Chronicles (publiſhed by *Gale*,) fix this *Survey* accordingly, *ad. an.* 1086. *Vid. Hale Hiſt. of the Com. Law*, 109. *Mad. Hiſt. of the Exchеq. fol.* 6. *in Marg.*

London

London and *Saliſbury* (n), to do their *Homage*, and ſwear their *Fealty* to him,

(n) *Ingulphus* who lived at that Time ſays, *ad an.* 1085. that the King *reverſus in Angliam apud Londonias Hominium ſibi facere & contra omnes Homines Fidelitatem jurare omnem Angliæ incolam imperans totam Terram deſcripſit.* Ingul. Int. Script. poſt Bedam, 908. ——*Henry* of *Huntingdon*, (*ibid. fol.* 370.) ſays that *Willielmus Rex fortis, Anno Decimo nono Regni ſui, cum de more tenuiſſet Curiam ſuam in Natali apud Glouceſtre, ad Paſcha apud Winceſtre, ad Pentecoſten apud Londoniam, Henricum filium ſuum virilibus induit Armis. Deinde Accipiens Hominium omnium terrariorum Angliæ cujuſcunque Feudi eſſent, Juramentum etiam Fidelitatis non diſtulit.*——*Brumton* (*int. Script. X. fol.* 979.) agrees with this Account of *Huntingdon*, but fixes it, *ad annum viceſimum Regis*, and ſuppoſes the *Survey* of *England* to have been made in the Year before.

The *Waverly* Annals, *Mat. Paris* and *Mat. Weſtm.* agree almoſt *in terminis* with *Hen.* of *Huntingdon*, but fix this Homage *ad An.* 1084——The *Saxon* Chronicler ſays, *ad An.* 1085. *Hoc Anno Rex tenuit ſuam Curiam in Winceſtre ad Paſcha, atq; ita Itinera inſtituit, ut eſſet ad Pentecoſten apud Weſtminſter, ubi Armis militaribus honoravit filium ſuum Henricum. Poſtea ſic Itinera diſpoſuit, ut Pervenerit in Feſto Primitiarum ad Searebyrig, ubi ei Obviam venerunt ejus Proceres & omnes prædia tenentes, quotquot eſſent notæ melioris, per totam Angliam hujus Viri ſervi fuerunt, omneſque ſe illi ſubdidere, ejuſque facti ſunt Vaſſalli, ac ei Fidelitatis Juramenta præſtiterunt, ſe contra alios quoſcunque illi fidos futuros. Hoveden* (*Int. Script. poſt Bedam*, 460.) *Ad. An.* 1086. ſays that *Willielmus Rex fecit deſcribi omnem Angliam*——*Poſt hæc in Hebdomada Pentecoſtes filium ſuum Henricum apud Weſtmonaſterium, ubi Curiam ſuam tenuit, Armis Militaribus honoravit, nec multo poſt Mandavit ut Archiepiſcopi, Epiſcopi, &c. Calendis Auguſti ſibi occurrerent Sariſbirie, quo cum veniſſent Milites illorum*

him, by doing whereof the *Saxon Chronicler* ſuppoſes that, at that Time, *Proceres & omnes prædia tenentes ſe illi ſubdidere, ejuſque facti ſunt Vaſalli*, ſo that we may reaſonably ſuppoſe,

Firſt, That this general *Homage* and *Fealty* was done at this Time (nineteen or twenty Years after the Acceſſion of *William* I.) in Conſequence of ſomething new, or elſe that Engagements ſo important to the Maintenance and Security of a new Eſta-

illorum ſibi Fidelitatem Jurare coegit. ——— *Simeon Dunelm.* (*Int. Scrip. X.* 213) agrees *in terminis* with *Hoveden.* And the *Waverly* Annals again, *ad An.* 1086. ſay that *An. Reg. Will'i Viceſimo Rex tenuit Curiam ſuam apud Wintoniam, poſtea ad Kalendas Auguſti fuit apud Saliſburiam, ibique venerunt coram eo Barones ſui & omnes terrarii hujus Regni, qui alicujus pretii erant, cujuſcunque Feodi fuiſſent, & omnes Homines ſui effecti ſunt, & Juraverunt illi Fidelitatem Contra Omnes Homines.*

It muſt be obſerved, that tho' ſome of theſe Hiſtorians mention only the Homage done at *London*, others that at *Saliſbury* only, and *none* but the *Waverly Annals* expreſly mention *both*; yet we may upon the Credit of theſe *Annals* ſuppoſe, that theſe Hiſtorians ſpeak of two *ſeveral Homages* done about the ſame Time, ſoon after the King's Knighting his Son *Henry:* Beſides that it is highly probable that the King received the *Homage* of ſome at *London*, and of others at *Saliſbury*; It being very unlikely that the Landholders who lived in or about *London*, where the King often was, ſhould come to *Saliſbury* to do their *Homage.*

bliſhment

bliſhment would have been required long before; and if ſo, it is probable that *Tenures* were then new, inaſmuch as *Homage* and *Fealty* were, and ſtill are, meer feudal Engagements, binding the *Homager* to all the Duties and Obſervances of a *Feudal* Tenant o).

2dly,

(o) It appears not only from the ſeveral Hiſtorians cited in the former Note; but likewiſe from the Mirror 226, 227. *Britton* 172. *b. Bract. Lib.* 2. *Cap.* 35. *Sect.* 8, 9. and *Fleta*, *Lib.* 3. *Cap.* 16. *Sect.* 21. That *Homage* and *Fealty* (though treated by the Feudiſts as Synonymies) were really with us diſtinct, though concomitant Engagements; for though *Fealty* was incident and eſſential to *Homage* or *Tenure*, (1 *Inſt.* 65. *& ſupra p.* 35.) and is now become Part of the Form of *Homage* itſelf; (*vid. Stat. de Homagio*, 17 *Edw.* 2. and *Lit. Sect.* 85.) yet there was, no doubt, antiently a conſiderable Difference between them; inaſmuch as *Homage* was merely a Declaration of the *Homager*'s Conſent to become his Lord's Man, or military Tenant of ſuch Lands or Tenements. (*Jeo deveigne voſtre home de tiel fief. Mirror p.* 206. and the ſame Author, *p.* 304. reckons it one of the Abuſes of the Common Law, *de mettre pluis des paroles en Homages faire forſque tant, jeo deveigne voſtre home del fiew que jeo claime tenir de vous*). *Homagium & Dominium* are therefore directly oppoſed to each other by *Glanvil*, *viz. Mutua*——*debet eſſe Dominii & Homagii fidelitatis Connexio, Ita quod Quantum Homo debet Domino ex Homagio*, (*i. e.* by conſenting to become his Tenant, or on Account of his Tenure) *tantum illi debet Dominus ex Dominio*, (*i. e.* by becoming his Lord, or on Account of his Seigniory) *præter ſolam reverentiam.* Vid. Glanv. Lib. 9. Cap. 4. *Fealty* on the other Hand

2dly, That as this general *Homage* and *Fealty* was done about the Time that *Domeſday-Book* was finiſhed, and not before, we may ſuppoſe, that that Survey (p) was taken upon, or ſoon after, our Anceſtors Conſent to *Tenures*, in order to diſcover the Quantity of every Man's Fee, and to fix his *Homage* (q); this Suppoſition is the more probable, becauſe it is not likely, that a Work of this Nature was undertaken without ſome imme-

Hand was a ſolemn Oath, conſequential to *Homage*, and ſworn immediately after it, that the Homager would, as his Man or Tenant, be *faithful* to his Lord.

(p) The Nature of this Survey may be collected from *Spelm. Gloſſ. ad verbum Domeſdei. Seld. præf. ad Eadmerum*, 3, 4. *Gerv. de Tilb. Dial. de ſcacc. Lib.* 1. *Cap.* 16. *Ingul. Hiſt. int. ſcript. poſt Bedam*, 908, 909.

(q) Becauſe anciently the Name and Quantity of the Fee, *&c.* was ſpecified in the Homage, as appears from the *Mirror*, *Cap.* 3. *Sect.* 36. *d'Homage*, where it is ſaid, that *Homage eſt fait en ceſtes parolls, Jeo deveigne voſtre home de tiel fief, iſſintque tout l'quantity ſoit monſire & Eſpecifié en certain* (or as *Britton* 174. ſays, *nomement par certeyne quantite & par certeyns boundes*) *par Quoy l'ſn'r ſache combien & quoy il doit garranter a ſon Tenant; & de combien il oblige ſon Fief a la Garrantie & que le tenant ſache d'combien il devient ſon home.* And this probably was the Reaſon why almoſt all the Hiſtorians of thoſe Times join the Account of this *Survey*, and of the *Homage* done about that time, together in ſuch a Manner, that we muſt needs think they took them to have immediate Relation one to the other.

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diate Reaſon, and no better Reaſon can be aſſigned why it was undertaken at this Time, or indeed why this Survey ſhould have been taken at all (r).

Taking it therefore at preſent for granted, that Fees or Tenures were firſt eſtabliſhed in *England* in the Time of *William* I. (ſ), I ſhall now proceed

(r) For *Alfred* had taken a general Survey of the whole Kingdom, which was ingroſſed and kept at *Wincheſter*, and extant in this King's Time, (*See Sir Jo. Spelman's Life of Ælfred, publiſhed by Hearne, p.* 108, 115.) but this Survey ſeems to have been too general to anſwer the Purpoſes of this Reign, and therefore a more particular Survey was taken. This Difference between the two Surveys is (without his aſſigning any particular Reaſon for it,) obſerved by *Ingulphus*, who ſays that *Alfredus* ——— *totam terram Angliæ per Comitatus, Centurias & Decurias deſcripſerat:* But that in *Domeſday-Book, non tantum totius terræ Comitatus, Centuriæ & Decuriæ, Sylvæ, Saltus & Villæ univerſæ, ſed in omni Territorio, Quot Carucatæ terræ, quot Jugera & quot acræ, quæ Paſcua & Paludes, quæ Tenementa & qui Tenentes continebantur.* Ingul. int. Script. poſt Bedam 908.

(ſ) *i. e.* That they in his Time firſt became a principal Branch of the national Policy, for it is not to be imagined, but that even in the *Saxon* Times, particular Proprietors of large Tracts of Land, which they could not cultivate and manure themſelves, might let ſome Part of them to their Neighbours, under various Acknowledgements, or Returns of Service, not altogether unlike ſome of the feudal Returns. Eſpecially as our *Saxon*

proceed to inquire and conſider the Means by which ſo extraordinary an Alteration of the national Policy, with reſpect to *Propriety*, was brought about. In which Inquiry many Things will occur that may poſſibly convince us, that this Alteration was made in the Time of this King.

I call the Eſtabliſhment of Tenures an extraordinary Alteration, not only becauſe it was ſuch in many of its Conſequences, but likewiſe becauſe it originally and immediately defeated all Suppoſition or Poſſibility of Propriety in any other Perſon than the King. Inſomuch that it became a fundamental neceſſary Maxim, Principle or Fiction of our *Engliſh* Law of *Tenures*, that the King is univerſal Lord of his whole Territories, and that no Man doth, or can poſſeſs any Part thereof, or Lands there-

Saxon Anceſtors may be ſuppoſed to have had ſome Notion of ſuch Returns; they being a Colony or Branch of the ancient *Goths*, who firſt brought the *Feudal Policy* into *Europe*——Upon this Suppoſition the wide Difference of Opinions, concerning the Antiquity of Feuds in *England*, may be in ſome Meaſure accounted for.

in,

in, but as either mediately, or immediately derived from him (t).

This Principle or Fiction, howſoever underſtood by Perſons of Capacity, and in the Councils of this King, appeared no doubt to others rather as the Language and Declaration of a Conqueror, than as the *Subſtratum* and Foundation of a new Policy not impoſed, but nationally and freely adopted (u): And it is certain that this Principle or Fiction of *Tenures* hath been of late ſo far miſtaken, that very learned Men, not conſidering it as a Fiction, have thought that the firſt Kings of this Realm had all the Lands of *England* in Demeſne, and that all private Poſſeſſion was actually derived from them (w): But in this they ſeem to have too implicitly followed the *Monkiſh* Hiſtorians, who (being prejudiced or miſled poſſibly by the large Poſſeſſions of a

(t) *Ex Ratione Feudali omnia Feuda & Beneficia ab eo (Domino ſcil't ligio) proficiſcuntur & de eo tenentur.* Crag. De Jur. Feud. 223. Vide Spelman Treat. of Parliaments 57. & infr. p. 137.

(u) Vid. inf. p. 64—73.

(w) Vid. 1 Inſ. 58. b. Spelm. Treat. of Parliaments 57, 58. and Lord Verulam of the Uſe of the Law 34.

ſudden

ſudden acquired by the *Normans* to the Prejudice of the *Engliſh*) have roundly affirmed that *William* I. violently diſpoſſeſſed the *Engliſh* of all their Lands, and that he diſpoſed of them upon arbitrary Terms of Tenure to ſuch of his Followers, and in ſuch Proportions as he thought fit (x); for, notwithſtanding the many *Monkiſh* Relations of this Sort, credited by later Writers of Learning and Note (y), we may,

(x) *Mat. Weſtminſter* (*Lib.* 2. *fol.* 1.) ſays that *Commilitonibus ſuis Normannis qui in bello Haſtingenſi patriam ſecum ſubjugaverant, terras Anglorum & poſſeſſiones, ipſis expulſis ſucceſſive, manu diſtribuit affluenti, & modicum illud quod remanſerat, factus jam de Rege Tyrannus, ſub jugo detruſit perpetuæ ſervitutis*——Mat. Paris (*ad An.* 1067. *fol.* 5.) aſſerts the ſame Thing *in Terminis*——*Bromton* (*int. Script. X.* 963.) ſays that *Rex Willielmus terras Anglorum Magnatibus & Militibus, ac aliis hominibus Franciæ & Normanniæ qui ſecum in Conqueſtu ſuo extiterant donavit*—*Thorn* likewiſe (*int. Script. X.* 1787.) ſays *ad An.* 1067. that *Willielmus de Rege factus eſt Tyrannus, Expulſiſque Regni Nobilibus, Epiſcopis, Comitibus, Abbatibus & Clericis multis, quos longum eſſet Nominatim Exprimere, eorum Poſſeſſiones & prædia diatim ſuis diſtribuebat Normannis.*

(y) Sir *H. Spelman* upon the Authority of theſe *Monkiſh* Writers, (*Gloſſ. Verbo Feodum*) ſays that *Lege ea* (feudorum ſcil't) *E Normannia traducta, Angliam totam ſuis diviſit Commilitibus*——And thus *Selden* (*a Cambden in Norm. Epin.* 13.) ſays that *Excluſis ab Hæreditate avita Anglis, Agros & prædia militibus ſuis Aſſignavit, Ita tamen ut Dominium directum ſibi reſervaret, obſequiumque*

may, upon due Inquiry and Conſideration, be ſatisfied, that *William* I. did neither poſſeſs himſelf, nor as a Conqueror diſpoſe of all, or any of the Lands of *England*: Nor did he arbitrarily, and by his own Power ſubject the Eſtates of the *Engliſh* to a feudal Dependence; for,

I. Tho' it is true that the Poſſeſſions of the *Normans* were of a ſudden very Great, and that they received moſt of them from the Hands of *William* I. yet it does not follow, that this King took all the Lands of *England* out of the Hands of their ſeveral Owners, claiming them as the Spoils of War, or as Parcel of a conquered Country; but on the contrary it appears pretty plain from the Hiſtory of thoſe Times, that the King either had, or pretended Title to the

quiumque clientelari Jure ſibi & ſucceſſoribus devinciret, i. e. ut omnes in Feodo ſive Fide teneant, & nulli præter Regem eſſent veri Domini, ſed potius fiduciarii Domini & Poſſeſſores. And the Lord *Verulam* aſſerts, that the Conqueror got by Right of Conqueſt all the Land of the Realm into his own Hands in Demeſn, taking from every Man all Eſtate, Tenure, Property and Liberty of the ſame, except Religious and Church Lands, and the Land in *Kent.* *Verul. of the Uſe of the Law* 34, 35.

Crown,

Crown, and that his Title, whether real or pretended, was eſtabliſhed by the Defeat of *Harold*, which amounted to an unqueſtionable Judgment in his Favour. He did not therefore treat his Oppoſers as Enemies, but as Traitors (z), agreeably to the known Laws of the Kingdom, which ſubjected Traitors not only to Loſs of Life, but of all their Poſſeſſions (a); ſo that this King, thus intitling himſelf to the Lands of all ſuch as had, or did afterwards oppoſe him, might well reward his Followers in the Manner he did, and that this muſt have been the Caſe appears from the Nature of the Pleas held and determined at *Pinenden* (b), and *Sharnburn* (c), and by many other Evidences of the Time of this

(z) Vid. Bacon, Hiſt. of the Eng. Gov. 135.

(a) Vid. Leg. Alfredi Cap. 4. Leg. Canuti Cap. 54. Saltern de Antiquis Britan. Legibus Cap. 10.

(b) This Plea is printed at large in Mr. *Selden*'s Notes *ad Eadmerum* 197, 200. *Vid. Lamb. Peramb.* 236, 237. *Hale Hiſt. of the Com. Law* 96.

(c) This is to be found at large in Sir *H. Spelman's Poſthum. Treat. de Familia de Sharnburn, fol.* 190. *Vid Wilkins Leg. Anglo-Sax.* 287. *Hale Hiſt. of the Com. Law* 99. *Spelm. Gloſſ. ad verb. Drenches. Bacon Hiſt. of the Eng. Gov.* 158. and *Taylor Hiſt. of Gav.* 65, 66.

King,

King, and of his immediate Succeſſors (d).

II. As *William* I. did not claim, or poſſeſs himſelf of the Lands of *England* as the Spoils of Conqueſt, ſo neither did he tyrannically and arbitrarily ſubject them to a feudal Dependence; but as the Feudal Law was at that Time the prevailing Law in *Europe* (e), and "was then, ſays "Sir *Henry Spelman* (f), conceived "to be the moſt abſolute Law for "ſupporting the Royal Eſtate, pre-"ſerving Union, confirming Peace, "and ſuppreſſing Incendiaries and "Rebellions," *William* I. who had always governed by this Policy, might probably recommend it to our Anceſtors, as the moſt obvious and ready Way to put them upon a Foot with their Neighbours, and to ſecure the Nation againſt any future At-

(d) Vid Tayl. Hiſt. of Gav. 67, 68. Madox Hiſt. of the Exchеq. 75, 76. Wilkins Leg. Anglo-Sax. 236.

(e) Sir *Hen. Spelman* (*Poſthum. Treatiſe of Parliaments* 57) calls it the Law of Nations, for ſo, ſays he, I may term the Feudal Law then to be in our Weſtern Orb.

(f) Poſthum. Treat. of Feuds 5, 6.

tempts

tempts from them (g), and might probably propoſe Laws agreeable thereto, as ſuch *quæ ad Utilitatem Anglorum, & ad Regni Pacem tuendam Efficaciſſimæ videbantur*; (h) and it can be no Wonder that ſuch of our Anceſtors, as then compoſed the *Commune Concilium* of the Nation, under the Senſe they then were of the Strength and Progreſs of this Policy, ſhould conſent to its Eſtabliſhment, and readily concur in a Law effectually penned for that Purpoſe: We find accordingly, among the Laws of *William* I. a Law enacting the Feudal Law itſelf, not *eo Nomine*, but in Effect; inaſmuch as it requires from all Perſons the ſame Engagements to, and introduces the ſame Dependence upon

(g) *Pluſurs manners d'fees & de tenur ſount dount touts l's plus ſount Dè Chivalry & d'grand Serjaunty l's quex fees fuerent perveus al d'fes d'noſt. Realme. Britton Cap.* 66. p. 162. *b.* And the Lord *Coke* ſays, (1 *Inſ.* 75. *b.*) that this Service *(Servitium ſcil't militare)* was created and provided for the Defence of the Realm.

(h) *Propoſitis Legibus Anglicanis ſecundum tripartitam earum Diſtinctionem, hoc eſt, Marchenelage, Denelage, Weſtſaxenelage, quaſdam reprobavit, quaſdam autem approbans, illis tranſmarinas Neuſtriæ Leges, Quæ*

(ad

upon the King as *Supreme Lord* of all the Lands in *England*, as were ſuppoſed to be due to a *Supreme Lord* by the *Feudal* Law: So that it clearly enacts the Foundation at leaſt of all the Deductions and Gloſſes, that are now treated as Part of that Law. The Law I mean is the LII. Law of *William* I. (i), which runs thus (k) STATUIMUS UT OMNES LIBERI HOMINES FOEDERE ET SACRAMENTO AF-

(ad utilitatem Anglorum LL. *Will.* I. Cap. 63. &) *ad Regni Pacem tuendam, Efficaciſſimæ videbantur, adjecit.* Gervaſ. de Tilb. Dial. de Scacc. Cap. 16.

(i) It muſt be obſerved concerning this Law, that though the Subſtance of it is to be found in the Collection of *Edward* the Confeſſor's Laws; *(Cap.* 35. *Tit. Greve,)* yet conſidering the Subject Matter of the Law itſelf, and how much that Collection is ſuſpected; *(Vid. Somn. Treat. of Gav.* 101. *Seld. Hiſt. of Tithes* 224. 225. and *Brady Gen. Pref. to the Hiſt. of England*, 30.) it is moſt likely that this is an original Law of *William* I. and that the Collection we now have of the Confeſſor's Laws which was drawn up at the Importunity of the People, *(See the Pref. to theſe Laws, Lamb. de Priſcis Angl. LL.* 138. and *Wilk. Leg. Angloſax.* 197.) in the Time of *William* I. might receive ſome of the Alterations and Additions that were made in his Time.——The Reader will judge whether this Conjecture hath not ſome Countenance from the LIII. Law of *William* I. which Commands that all Perſons ſhould have and obſerve the Laws of King *Edward*, *in omnibus rebus*, ADAUCTIS HIIS *quas conſtituimus ad utilitatem Anglorum.*

(k) In Mr. *Selden*'s Notes *ad Eadmerum fol.* 190. and *Lamb. de Priſcis Ang. Leg.* 170.

FIRMENT (l), QUOD INTRA ET EXTRA UNIVERSUM REGNUM ANGLIÆ (QUOD OLIM VOCABATUR REGNUM BRITANNIÆ (m), WILLIELMO SUO DOMINO (n) FIDELES ESSE VOLUNT, TERRAS ET HONORES (o) ILLIUS FIDELITATE UBIQUE (p) SERVARE CUM EO, ET CONTRA IMIMICOS ET ALIENIGENAS DEFENDERE (q).

The Terms of this Law are abſolutely Feudal, and are apt and proper to eſtabliſh that Policy with all its Conſequences; for Firſt, It requires that all Owners of Land (r) ſhould expreſsly en-

(l) Statuimus ut omnis Liber Homo fide & ſacramento affirmet. *Hoveden, Int. ſcript. poſt Bedam* 600.

(m) Quod intra & extra Angliam. *Ibid.*

(n) Willielmo Domino *Regi* ſuo *ibid.*——Willielmo *Regi* Domino ſuo. *Wilkin's Leg. Angloſax.* 228.

(o) Honorem. *Hoveden. Ibid.*

(p) Omni fidelitate ſua. *Ibid.*

(q) Et contra inimicos defendere. *Ibid.*

(r) I have thus tranſlated the Words *Liberi Homines*, becauſe this Senſe agrees beſt with the Tenor of the Law: And becauſe it is probable that at that Time no other Perſons were ſo called, than thoſe who are frequently in *Domeſday-Book* called *Aloarii* and *Alodiarii*, and had *terram propriam*, Land wherein no other Man had any Intereſt by *Feodal* Superiority or Dominion, (*Vid. Spelm. Treat. of Feuds* 18.) and that they were called

engage and ſwear (ſ), that they would become Vaſſals or Tenants (t), and as ſuch

called *Homines Liberi* in Oppoſition to the *Villains* of thoſe Times. (*Vid. Bacon Hiſt. of Eng. Gov.* 56. *Brady Introd. to the Hiſt. of Engl.* 221. *and Sir Wm. Temple Introd. &c.* 65.) Thus according to Sir *Hen. Spelman*, (*Gloſſ. ad verba Liber Homo*) the Titles *Liber Homo*, *Liberi Homines*, *Liberi & Legales homines ad nobiles olim ſpectabant, maxima enim vulgi pars aliqua ſervitutis ſpecie coercebatur, ſic ut ſui eſſe mancipii non liceret.* ——And it is certain that upon the Introduction of Tenures, theſe Appellations or Titles were uſed to denote ſuch Perſons as had the moſt honourable and independent Eſtates, and came neareſt to the Condition of thoſe who were called *Liberi Homines* before. (*Vid. Brady Gloſſ. ad verba Liberi Homines.*) Hence ſome Time after the Eſtabliſhment of Tenures, the Freeholders even of private Lords were called *Liberi Homines ſui*, as in *Magna Charta Reg. Johannis*, *viz. Nos non concedemus de cætero alicui Quod capiat auxilium de* liberis Hominibus ſuis *niſi*, *&c.* and in *Bracton*, (*Lib.* 2. *Cap.* 16. *Sect.* 8. ſuch Tenant of a private Lord is called *Liber Homo ſuus.* This ſenſe of the Words *Liberi homines* is warranted by the Hiſtorians of thoſe Times, who agree that *William* I. received the Homage *Omnium Terrariorum Angliæ cujuſcunq; feudi eſſent*, *&c.* Sup. 53. m.

(ſ) That *Homage* was the *Fœdus* anſwering this Law, is probable from the moſt ancient Form of it, *Jeo deveigne voſtre home*, *&c.* (*ut ſup. p.* 55. m) which though pronounced by the Tenant, equally obliged the Lord; for *Homage* according to *Britton*, (170) *lie deux homes per leur Commun aſſent*——*Et eſt un lien de droit dount autant eſt le Seigniour tenu a ſon home come le home a ſon Seigniour forque ſolement en reverence.* (Vid. Fleta Lib. 3. Cap. 16. Sect. 8, 9.) And that the *Oath of Allegiance* was the *Sacramentum* required by this Law can hardly be doubted.

(t) That this is the proper feudal Senſe of the Word *Fidelis*, appears from *Hotoman*, (*de verb. Feudal. ad verb. Fidelis,*) *viz. Fidelis interdum ſpecialiter dicuntur iidem*

ſuch be faithful (u), to *William* as their *Lord*, in reſpect of the *Dominium* upon the then known feudal Notion reſiding in a *Feudal Lord.*

2dly, That they would, in Conſequence of their becoming his Vaſſals or Tenants, every where faithfully maintain and defend his their *Lord's* Territories and Title, as well as Perſon, and give him all poſſible Aid and Aſſiſtance againſt his Enemies, whether Foreign or Domeſtick (w).

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Qui vaſalli, Qui feudo accepto in Patroni fide & Clientela ſunt, viciſſimque ſuam ei certi obſequii nomine fidem aſtrixerunt——And according to Sir *Hen. Spelman*, (Gloſſ. ad verb. Fidelis) *Fideles dicuntur Qui in alicujus clientela ſunt ratione Prædii*——*Qui prædia tenent Quod feudum dicitur, &c.* And in this Senſe, the Word *Fidelis* is often uſed in the Book of Feuds. *(Feud. Lib.* 1. *tit.* 1, 5, 10. *Lib.* 2. *tit.* 23, *&c.)* And in the Direction of ſeveral ancient Charters, *(Vid. Hearne's Text. Roff. & Brady Gloſſ. ad verb. Feudatarii & Fideles)* as well as in this Law.

(u) The Word *Fideles*, thus ſubſtantively and adjectively rendered, diſtinctly anſwers the *Fœdus & Sacramentum* injoined by this Law.

(w) In Conſequence hereof the LIXth Law of this King requires that *omnes Liberi Homines totius regni*—— *ſint fratres conjurati* (Vid. LL. Edovardi Cap. 35) *ad monarchiam*——*& ad regnum*——*pro viribus ſuis & facultatibus contra inimicos pro poſſe ſuo defendendum*——*& pacem & dignitatem Coronæ*——*Integram obſervandam.*——And the Stat. 7 *Edw.* I. *Cap.* 1. declares, that the Prelates, Earls, Barons and *Commonalty*

The manner of penning this Law, is not leſs obſervable than the Terms of it, for though it begins, as many other Laws of this King, with the Word *Statuimus* in the firſt Perſon plural, according to the preſent Stile and Language of Kings (x), without ex-

Commonalty of the Realm are bound to aid the King as their Sovereign Lord, to defend Force of Armour, and all other Force againſt his Peace at all Seaſons, when need ſhall be.———And the LVIIIth Law of *William* I. requires, that *omnes Comites, Barones & ſervientes & univerſi Liberi Homines totius regni———teneant ſe ſemper prompti & bene parati ad ſervitium ſuum integrum——— explendum & peragendum, Cum ſemper opus adfuerit, ſecundum quod de feodis debent & tenementis ſuis de jure (ſcil't feodali) facere.*

(x) Mr. *Madox*, in his Diſſertation Prefatory to *Gervaſe de Tilbury*'s Dialogue *de ſcaccario*, (*fol.* 6.) takes Notice that *pleraque brevia ab ipſo (ſcil't Gervaſio) citata ſtylum Regalem ſingularis numeri præ ſe ferunt,———*but that *Henricus ſecundus annis Imperii ſui poſterioribus, & poſt eum omnes Angliæ Reges numero plurali ſcripſerunt Nos & Noſtrum, &c.*

But though the ſingular was, as appears from the moſt authentick Memorials of thoſe Times, the Royal Stile uſual in Writs, Charters, and the like; (*Vid.* 2 *Inſt.* 2.) yet it is no Objection to the Laws of *William* I. that they (in the ſeveral Editions we have of them from Mr. *Selden*, Mr. *Lambard*, and Doctor *Wilkins*) run in the plural Stile; for that, as they were not meer Acts of the King, they were probably penned in this Manner, that they might, at the ſame Time that they declared the King's Will, intimate the Concurrence of the *Commune Concilium.* And it is obſervable, that though *Roger Hoveden*, (*Int. Script. poſt Bedam*, 600, 601.) in his Summary of theſe Laws, exhibits moſt of them in the ſingular Stile; yet he

expreſs Mention of the *Commune Concilium*; yet we cannot poſſibly doubt its Concurrence: Becauſe the King himſelf, being as it ſeems but *one* of *more*, is mentioned in the Body of the Law itſelf as a *third Perſon* ſpoken of, and *as ſuch* plainly diſtinguiſhed from the *Many* ſpeaking in the beginning or enacting Part of the Law, *viz. Statuimus ut omnes affirment Quod* WILLIELMO DOMINO SUO *Fideles eſſe volunt, terras & Honores* ILLIUS *ubique ſervare cum* Eo—In the Language of the other Laws of this King, it would have run, that *omnes affirment Quod* NOBIS *fideles eſſe volunt, terras & honores* NOSTROS *ubique ſervare cum* NOBIS, *&c.* ſo that the particular Penning of this Law may be underſtood in a great Meaſure to ſpeak its Importance; for that as it introduced a new Policy ſubver-

he gives us this LIId, and the LXth Laws of this King in the plural Stile. And Sir *Henry Spelman*, tho' he ſays that theſe Laws were for the moſt part ordained by King *William* in his own Name, is yet of Opinion that they were all made by the Conſent of the *Commune Concilium*. *Vide Spelm. Treat. of Parliaments* 61.

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ſive of the *Saxon* Propriety, and did conſequently affect the whole Nation in an extraordinary and unuſual Manner; it is penned as if the King was meerly paſſive, the more clearly and fully to expreſs the Conſent of the *Commune Concilium* to ſo conſiderable an Alteration: And that the particular Manner of penning this Law was not accidental, but expreſſive and important, will farther appear, if the Reader doth but caſt his Eye upon the other Laws of this King; for then he muſt ſee that none other of them are worded in this Manner: Nay, that the Manner of wording any other of them doth not ſo much as hint the Concurrence of the *Commune Concilium:* And which is ſtill more remarkable, that even ſuch of them as expreſsly mention the *Commune Concilium*, do not mention it, as having any Regard or Relation to themſelves; but with Reference meerly to this Law; for the 55th

and 58th Laws (y) of this King, which are the only Laws that menti-

(y) I ſhall here tranſcribe theſe Laws with their Titles, that the Reader may more readily apprehend, and judge of what is above ſuggeſted.

LV.

De clientelari ſeu Feudorum Jure & Ingenuorum Immunitate.

Volumus etiam ac firmiter præcipimus & Concedimus ut omnes Liberi Homines totius Monarchiæ regni noſtri prædicti habeant & teneant terras ſuas & Poſſeſſiones ſuas bene & in Pace libere ab omni Exactione injuſta & ab omni Tallagio, Ita quod nihil ab eis exigatur vel Capiatur, niſi Servitium ſuum Liberum quod de Jure nobis facere debent & facere tenentur, & prout ſtatutum eſt eis, & illis a nobis Datum & conceſſum Jure hæreditario in perpetuum per Commune Concilium totius Regni noſtri prædicti.

LVIII.

De Clientum ſeu Vaſſallorum Præſtationibus.

Statuimus etiam & firmiter præcipimus ut omnes Comites & Barones & Milites & ſervientes & univerſi Liberi Homines totius Regni noſtri prædicti habeant & teneant ſe ſemper bene in Armis & in Equis ut Decet & Oportet, & quod ſint ſemper prompti & bene parati ad ſervitium ſuum Integrum nobis explendum & peragendum cum ſemper Opus affuerit, ſecundum quod nobis de Feodis debent, & tenementis ſuis de Jure facere, & ſicut illis ſtatuimus per Commune Concilium totius Regni noſtri præd' & illis dedimus & Conceſſimus in Feodo Jure Hæreditario. Hoc Præceptum Noſtrum non ſit violatum ullo Modo ſuper forisfacturam noſtram plenam.

on

on the *Commune Concilium* (z), do not ſeem to mention it as concurring in thoſe Laws, but with Reference meerly to this 52d, or ſome other Law, (if there was any other (a), that is not now extant) introductive of Tenures.

Mr.

(z) The 56th Law hath indeed the Words *Commune Concilium*, but in another Senſe, as appears by the Context, *(viz.) Statuimus——Ut omnes Civitates——ſingulis Noctibus Vigilentur & Cuſtodiantur——prout Vicecomes & Aldermanni & Præpoſiti & cæteri Ballivi & Miniſtri noſtri melius per Commune Concilium ad Utilitatem Regni providebunt.*

(a) Which ſome may think probable on Account of the relative Words *prout ſtatutum eſt eis, & illis a nobis datum & conceſſum Jure Hæreditario in perpetuum per Commune Concilium* in the 55th Law; and of like Words in the 58th Law, *viz. Sicut illis ſtatuimus per Commune Concilium——Et illis dedimus & conceſſimus in Feodo Jure hæreditario*, which may ſeem to refer to ſome Law expreſsly eſtabliſhing hereditary Feuds, *&c.* conſequently to ſome other than the 52d Law, which barely eſtabliſhes Feuds without declaring their Continuance: But ſtill it ſeems to me much more likely, that the relative Words in both theſe Laws refer to this 52d Law, as the Baſis and Foundation of them, and that the Words *Jure hæreditario* in both of them are merely declaratory of the Intent and Meaning of the 52d Law, which tho' it had no expreſs Words of Inheritance could not mean by a meer politic Subſtitution of *Tenure*, in the Room of the *Saxon Propriety*, to render all Poſſeſſion arbitrary and precarious, as *original Feuds*; and yet our Anceſtors might be too cautious to rely upon the moſt obvious Conſequences, and therefore think ſuch Declarations proper:

Mr. *Selden*, notwithſtanding the Evidence of theſe Laws which he himſelf hath given us at large in his Notes to *Eadmerus*, is yet of Opinion (b) that the Poſſeſſions of *Biſhops* and *Abbots only* were made ſubject to *Tenures* in the fourth Year of *William* I. And

per: And I muſt confeſs that I cannot help thinking that the Words *jure hæreditario* in both Laws would be idle and impertinent in any other than ſuch declaratory Senſe. It muſt however be owned that Sir *H. Spelman* and the Lord *Hale*, in their inquiries after the Original of Tenures, take no Notice of the 52d Law, but that both of them treat this 58th Law as a ſubſtantive Inſtitution: And Sir *H. Spelman* ſuppoſes that the Words *Conceſſimus in Feodo Jure hæreditario* in that Law imply, that Feuds were not hereditary before that Grant. *Vid. Spelm. Poſt. Treat. of Feuds* 45. and *Hale Hiſt. of Com. Law* 107, 224. In anſwer to this, I ſhall take Leave to obſerve, that the Purview and Occaſion of both theſe Laws were plainly conſequential to ſome former Law; for the King in the 55th Law barely declares that *Omnes Liberi Homines totius Monarchiæ regni noſtri* ſhould hold their Lands *bene & in Pace*, free from all unjuſt Exactions——And that nothing ſhould be required of them, but the Services due *de Jure, i. e.* by the Feudal Law *prout ſtatutum eſt eis*, which they had conſented to, and eſtabliſhed——After this Declaration, the King in the 58th Law very properly requires, that *Univerſi Liberi homines totius Regni* ſhould on all Occaſions be ready to do the Services they ought *de Jure facere, ſicut illis ſtatuimus per Commune Concilium, i. e.* that they ought to do by the Feudal Law, which was as above eſtabliſhed *per Commune Concilium.*

(b) *Tit. of Hon.* 578,—580. And of this Opinion were the Judges of *Ireland*, in the Caſe of Tenures upon the Commiſſion of defective Titles, *p.* 199.

that

that *Thain-lands* were even in the *Saxon* Times, ſubject to *Knight-Service* (c), as being included in the *Saxon Expeditio*, a Branch of the *Trinoda Neceſſitas*, or *Landirectum* (d), to which ſuch Lands were liable in thoſe Times; and as it could not be denied, but that the Lands of *Biſhops* and *Abbots* were in thoſe Times ſubject to the *Trinoda Neceſſitas* as well as *Thain-Lands*; he labours to prove that the Obligations of the *Trinoda Neceſſitas* were different, in reſpect of the one and of the other (e): But as

(c) Vid. Seld. Tit. of Hon. 507, 508, 510, 511, 518, 520.

(d) *Thani lex eſt*——*Ut tria faciat pro terra ſua, Expeditionem, Burghbotam & Brughbotam, & de multis Terris majus Landirectum*——Thus in *Engliſh*, the Law touching a *Thane* is——That in reſpect of his Land, he ſhall do three Things, *(viz.)* Military *Expedition*, Repairing of *Caſtles*, and mending of *Bridges*, and for more Lands to do more *Land Duties*, *&c. Spelm. Treat. of Feuds* 17. Mr. *Selden* citing this Law, ſays that the two laſt of theſe Duties, *(viz. Burghbota & Brughbota)* are the ſame that commonly occur in the *Saxon* Reſervations, by the Name of *Arcis Pontiſque Conſtructio*, or *Extructio* (and which, with the other, *(viz.) Expeditio)* are together called, in ſome Charters to the Church of *Canterbury*, *Trinoda Neceſſitas*. *Seld. Tit. of Hon.* 516.

(e) Ibid. 577, 578.

Sir

Sir *Hen. Spelman* hath confuted this Opinion, by proving that the *Expeditio* to which the Lands of *Biſhops* and *Abbots*, as well as *Thain-Lands*, were ſubject, was one and the ſame (f), and that the *Expeditio*, to which both were liable, was the military Policy of the *Saxon* Times (g), and very unlike the later Feudal Policy: I need only add, that ſince it is highly probable, as well from what I have already

(f) Spelm. Treat. of Feuds, 22, 23, 43.

(g) Sir *H. Spelman* conceives it to have been a Fundamental Law or Cuſtom of the Kingdom, (as ancient as the Kingdom itſelf) whereby all the Land of the whole Kingdom was obliged *Trinodæ Neceſſitati* of military *Expedition*, and *Building* and *Repairing* of *Caſtles* and *Bridges*; and that all the Land of the Kingdom was wholly tied to theſe three Services, appeareth, as he ſays, in the *Council* of *Eanham*, where they are commanded to be yearly done. And by the Laws of *Canutus*, where they are appointed to be done as Neceſſity requireth. And alſo by the Law of King *Ethelred*, who about the *thirtieth Year* of his Reign, ordained that every eight *Hides* or *Plough-Lands*, through the whole Kingdom, ſhould find a Man with a *Croſlet* and *Helmet* to the *Naval Expedition*, and every Three hundred and Ten *Plough-Lands*, an ordinary Ship. For theſe Purpoſes (ſays he farther) was the whole Land formerly divided either by *Alfred* the Great, or ſome other precedent King into 243600 Hides or Plough-Lands, and according to this Diviſion, were the Military, and other Charges of the Kingdom impoſed and proportioned. *Vid. Spelm. Treat. of Feuds* 17, 18, *&c.*

offered

offered concerning the Introduction of Tenures, as from the direct Authority of Sir *H. Spelman* (h), that the *Saxon Expeditio* was firſt aboliſhed in the Time of *William* I. and that the *Feudal* military Policy was upon the Foot of *Tenure* ſubſtituted in the Place of it, and did *then* originally and totally ſucceed to it, we have little Reaſon to ſuppoſe with Mr. *Selden*, that *Tenures were then ancient* in reſpect of *other* than the Lands of *Biſhops* and *Abbots*, and that the Lands of *Biſhops* and *Abbots only* were *then* made ſubject to Tenures; and we have, I think, the leſs Reaſon to incline to this Opinion; becauſe there is no particular Law to be found, by which ſuch Lands were ſingly ſubjected; and becauſe the 52d Law of *William* I. by which other Lands are ſuppoſed

(h) The old *Saxon* Manner of dividing the Kingdom by *Hides*, and levying Soldiers according to the *Hides* grew now (in the Time of *William* I.) out of Uſe, and inſtead thereof, the King's *Wars* were to be ſupplied by *Knights Fees*. *Spelm. Treat. of Feuds* 45.

to

to have been ſubjected to Tenure, may very well be underſtood to extend to them.

Suppoſing this a probable Account (for as ſuch only I offer it) of the Introduction and Eſtabliſhment of *Tenures*; it may ſeem Strange that the moſt ancient Hiſtorians ſhould repreſent them as ſlaviſh and tyrannical (i), and that our Anceſtors ſhould ſo ſoon grow weary of them, as even in the Beginning of *Henry* I.'s Reign, to deſire an entire Reſtitution of King *Edward's Laws* (k), and in them the total Deſtruction of *Te-*

(i) *Mat. Paris* (*ad An.* 1068, 1070. *fol.* 6, 7.) repreſents *Tenures ut ſervitus Militaris & Jugum perpetuæ Servitutis*, and calls the Law, by which the Eccleſiaſticks were ſubjected to *Tenure*, *Conſtitutio peſſima.*—*Mat. Weſtminſter* (*Lib.* 2. *fol.* 1.) ſays, that the few eſtates in the Hands of the *Engliſh*, *Willielmus factus jam de Rege Tyrannus ſub jugo detruſit perpetuæ ſervitutis.* And the *Saxon* Chronicler (*ad An.* 1085.) ſuppoſes that all the Landholders throughout *England* became, in Conſequence of their *Homage* or *Tenure*, *hujus viri* (*ſcilicet Willielmi*) *ſervi & Vaſſalli*——from theſe, and like Repreſentations probably the Words *Vaſſal* and *Vaſſalage* (which really imported nothing more odious than *Homo* and *Hominium*, or than *Tenens* and *Tenura*) became odious, and are uſed by us as Terms of Slavery and Reproach, even to this Day.

(k) Vid. inf. p. 82.

nure:

nure: But theſe Repreſentations, and theſe Deſires will not appear ſo Strange, if we conſider that, though it may be true, that our Anceſtors did conſent to the 52d Law of *William* I. which was (as is ſuppoſed) conceived in Terms apt and proper to introduce an abſolute *feudal* Dependence, and was probably penned by ſome *Norman Feudiſt* to anſwer that End; yet it is not likely that they, who were totally Strangers to the *Feudal* Law, and were ignorant of the Extent and Conſequences of it, ſhould underſtand this Law in that Latitude, it ſoon borrowed from ſubſequent Interpretations and Gloſſes; or that they ſhould mean more, than to oblige themſelves, in reſpect of their Lands to ſubmit to *William* I. as their *Lord* or King, to maintain his Title, and defend his Territories, as vigorouſly and faithfully as if they had actually received their Lands from him upon expreſs Terms of *Fealty:* But whatſoever their Meaning

was,

was, it is not to be wondered at, that *Norman Interpreters* (l), who not only knew the Extent and Import of the Terms of this Law, taken in a feudal Senſe, but the Policy and ultimate Deſign of penning it in a Manner ſo general and comprehenſive, ſhould expound it conformably to the *Norman* Reception, and Notion of FEUDS (m), ſo as to introduce and

(l) For ſuch they probably were, if we believe *Ingulphus*, who ſays, that *Comitatus & Baronias, Epiſcopatus & Prælatias totius terræ ſuis Normannis Rex (ſcilicet Willielmus) diſtribuit, & vix aliquem Anglicum ad Honoris ſtatum vel alicujus Dominii Principatum aſcendere permiſit.* (Ingulphus ad An. 1066. Int. Script. poſt Bedam 901.) The Reaſon whereof is given by *Eadmerus*, who ſays, that *Rex Willielmus*——*Uſus atque Leges quas patres ſui & Ipſe in Normannia habere ſolebant, in Anglia ſervare volens, de hujuſmodi Perſonis Epiſcopos, Abbates, & alios Principes per totam terram inſtituit, de quibus Indignum judicaretur, ſi per omnia ſuis Legibus poſtpoſita omni alia conſideratione non obedirent, Et ſi ullus eorum pro quavis terreni Honoris potentia, caput contra eum levare auderet; ſcientibus cunctis unde, qui, ad quid aſſumpti fuerint.* Eadm. fol. 6.

(m) Feuds being inſtituted by the Conqueror, the *Norman* Manner, ſays Sir *H. Spelman*, (*Treat. of Feuds* 45.) was preſently purſued here in *England*, as appeareth in *Domeſday*, where it is ſaid, *Habet*——*in eodem feudo de W. comite Radulpho de Limes* 50 *carucat' terræ ſicut ſit in Normannia*, joining *Normannia* with *Feudum*, to ſhew us whence it came, and where we ſhould ſee the Pattern of it.——Thus far then it may

and eſtabliſh not only the *Norman Wardſhip*, but all the *Feudal* and *Norman* Fruits, and Dependencies of *Fee* or *Tenure*, conſidered as a *pure original* FEUD, that is to ſay, as an Eſtate or Intereſt in the *Lord*'s Lands derived from the meer *Bounty* of the *Lord*; in reſpect whereof the Tenant was obliged to make as large Returns of Service and Gratitude, as if ſubſiſted by ſuch *Bounty* for the ſole Uſe and Service of the Lord. Our Anceſtors again, who were not direct *Beneficiaries*, but had barely conſented to a *Fiction* of *Tenure* as the meer *Subſtratum* of a new military Policy, muſt needs look upon ſuch Fruits or Conſequences of *Tenure*, as arbitrary Concluſions from Principles that had not, as to them, any Foundation in Reaſon or Fact, and as in Truth they were moſt grievous Impoſitions; and yet grievous as they were, they fell ſhort of the

may be true, as *Grotius* ſays, that *Anglia Normannorum Legibus etiam nunc regitur.* Grot. Prolegom. Hiſt. Goth. 64.

Exactions advanced upon *Tenures* in the Time of *William* II. our Anceſtors therefore haraſſed and wearied with the Extravagancies of this Reign, earneſtly deſire to get rid of them, and having upon the Death of this King a favourable Opportunity, as they thought, from the Pretenſions of *Henry* I. to obtain the utmoſt of their Hopes; they demand, and are promiſed the Reſtitution of King *Edward*'s Laws, and upon this Condition crown him (n): The King, when crowned, inſtantly by his *Charter* (o) aboliſhed all the evil Cuſtoms with which the Kingdom was oppreſſed (p), defeated the great Grievances of *Tenure* relating to *Relief* (q), *Wardſhip*

(n) Vid. Mat. Paris ad An. 1100. fol. 55. & Wilk. Int. LL. Anglo-Sax. 299.

(o) Which is to be found in *Mat. Paris, fol.* 55. and in *Lambard* and *Wilkins Int. LL. Hen.* 1. *Cap.* 1. and in *Hearne's Textus Roſſenſis* 51.

(p) *Omnes malas Conſuetudines quibus Regnum Angliæ injuſte Opprimebatur inde Aufero.* Vid. Chart. Hen. 1. ibid.

(q) *Siquis Baronum meorum, comitum vel aliorum qui de me tenent, mortuus fuerit: Hæres ſuus non redimet terram ſuam, ſicut faciebat tempore fratris mei,* (or as according to *Mat. Paris, ſicut facere conſueverat tempore patris*

ſhip (r) and *Marriage* (ſ), and then reſtored the Laws of *King Edward* in all Reſpects, ſaving *Tenures*, which he retained as *Amendments* made by his Father, with the Aſſent of his *Barons* (t). Our Anceſtors, notwithſtanding the *Laws* of *Tenure* were retained, and King *Edward*'s Laws were not, as to *them*, reſtored, were yet ſatisfied and eaſy under this *Charter*; and ſo continued until the Reign of King *John*, (u) when the old Grievances

patris mei) ſed legitima & juſta relevatione relevabit eam; ſimiliter & Homines Baronum meorum legitima & juſta relevatione relevabunt terras ſuas de Dominis ſuis. Ibid.

(r) *Et Terræ & Liberorum cuſtos erit, ſive uxor ſive alius propinquorum qui juſtus eſſe debet, &c.* Ibid.

(ſ) *Siquis Baronum vel aliorum Hominum meorum filiam ſuam nuptum tradere voluerit, ſive ſororem, ſive Neptim ſive cognatam, mecum inde loquatur. Sed neque Ego aliquid de ſuo pro hac licentia accipiam, neque ei defendam, quin eam det, excepto ſi eam jungere velit inimico meo. Et ſi mortuo Barone vel alio Homine meo, filia Hæres remanſerit, Illam dabo conſilio Baronum meorum cum terra ſua, &c.* Ibid.

(t) *Lagam Regis Edwardi vobis reddo cum illis Emendationibus quibus eam pater meus Emendavit. Ibid.*——— Theſe Amendments could be no other than the *tranſmarinæ Neuſtriæ, (i. e. Normanniæ) Leges quæ ad Regni Pacem tuendam efficaciſſimæ videbantur*, that is to ſay, no other than the Laws relating to military Tenures. *Vid. Spelm. Treat. of Feuds* 44 *& LL. W.* 1. *Cap.* 63.

(u) For the Charter of *Henry* I. was confirmed by King

ances were revived and aggravated to that Degree, that the *Barons*, or *liberi homines regni*, confederate and reſolve to get rid of them (w), and to that End demand a Confirmation of the *Charter* of *Henry* I. but the King denying it, they, by Menaces and Force at Hand, urge their Demands, but the King ſtill refuſing to comply with them, the *Barons*, we may ſuppoſe, lowered their Demands, and propounded certain *Capitula*, or Claims of Right, (x) which the King with Difficulty came into, but at length allowed under Seal, and the *Charter* called *Charta Johannis* was in Conſequence thereof ſealed 15 *June* in the 17th Year of his Reign, which not only fell ſhort of the *Charter* of

King *Stephen*, and by *Henry* II. *vid. Wilkins LL. Anglo-Sax.* 310, 318. And no doubt by *Richard* I. likewiſe.

(w) Although the Grievances relating to Tenure were not the only Grievances of theſe Times, yet as they were firſt redreſſed, and are the ſubject matter of near one third of King *John*'s Charter, they were no doubt the moſt conſiderable.

(x) The Original *Capitula* are ſtill extant, and appear from the Title, (viz. *Iſta ſunt Capitula quæ Barones petunt*

of *Henry* I. (y) but materially varied from the *Capitula* agreed to, and was yet fuller than that, we now have, of *Henry* III. (z)

petunt et Dominus Rex concedit) as well as from the Nature of them to have been Claims of Right.

The Publick is obliged to *William Blackſtone*, Eſq; Barriſter at Law, &c. for a very accurate Edition of theſe *Capitula*, and of the ſeveral Charters of K. *John* and of *Henry* III, &c. printed at Oxford 1759, to which I beg leave to refer the reader, when he ſees occaſion to conſult them.

(y) That King *John* did not abſolutely comply with the Barons firſt Demand of *Henry* I. his Charter, appears from the mighty Difference between that and this King's Charter, as to the Articles relating to Wardſhip, Marriage, *&c.* which, upon comparing the two Charters, will be too obvious to eſcape the Reader's Obſervation: Beſides it is probable from *Mat. Paris* his Account of the Manner of obtaining King *John*'s Charter, that when an abſolute Confirmation of *Henry* I. his Charter was not to be had, the Barons waved it, and drew up *a Schedule* of Laws and Liberties they agreed by all Means to inſiſt upon, the Particulars whereof were read to the King, and warmly denied: And yet afterwards upon a Treaty between him and the Barons, the King (ſays *Paris) tandem cum in varia ſorte tractaſſent* ——*ſine Difficultate* granted the Laws and Liberties contained in his Charter: So that theſe Laws and Liberties thus granted, after a long and doubtful Treaty, *ſine difficultate* or farther Scruple, cannot be ſuppoſed to have come up to thoſe Demands which were before thought ſo unreaſonable, that the King, ſays the ſame Author, *affirmavit cum Sacramento furibundus, quod nunquam tales illis concederet Libertates, unde ipſe efficeretur ſervus.* Vid. Mat. Paris 252—255.

(z) For ſeveral important Clauſes of King *John*'s Charter are omitted in that of *Henry* III.

Having thus far purſued the Inquiry propoſed, and having I hope in ſome Meaſure ſhewed, that Tenures, howſoever grievous or odious they became in their Conſequences, were not impoſed, but nationally and freely conſented to: I ſhall now proceed to ſhew, that *Wardſhip* and *Marriage*, *Relief*, *Aid* and *Eſcheat*, the Concomitants (a) or Conſequences of *Tenure*, were not mere *Norman* Inventions coined for us, but that they were either properly *Feudal*, or were for the moſt Part entertained as ſuch in *Normandy*, before they were known or heard of in *England*.

I. As for *Wardſhip* and *Marriage*, though ſome Authors have thought that they were known in *England* before the Coming of the *Normans* (b); others,

(a) *Bracton* improperly calls them *Concomitantia Servitia*. Bract. Lib. 2. Cap. 16. Sect. 8.——*neque enim Warda & relevium ſunt ſervitia, ſed tantummodo ſervitium Militare concomitantur, Itaque melius loqueremur ſi diceremus tenendriam eſſe per ſervitium Wardam & Relevium, aut ſervitium cum Warda & Relevio.* Crag. de jur. Feud. 59.

(b) *Taylor* infers from a *Britiſh* Law by him cited from a Manuſcript in his own Cuſtody, *De Leg. Howeli Boni*,

others, that they were introduced long after, and not till the Reign of *Henry* III. (c); yet it is plain from the Charter of King *John* (d), from ſeveral Records in the Time of *Henry* II. and *Richard* I. (e), and from *Glanvil* (f), who wrote in the Time of *Henry* II. that they were before the Reign of *Henry* III. and it ſeems as clear from the *Cuſtumier* of *Nor-*

Boni, that *Wardſhips* were uſed among the *Britons* before the *Norman Conqueſt*. *Tayl. Hiſt. of Gav.* 103, 105. *Vid. Mir. de Juſt.* 18. and the abovementioned Caſe of Tenures 203.

(c) Sir *Henry Spelman* conceives the Reaſon that many Authors did ſuppoſe this Part of the Feudal Law to have been introduced by *Henry* III. was, becauſe the various Uſages, touching Wardſhip and Marriage, were not compoſed into an uniform Law, until the *Mag. Charta of Henry* III. did determine them. *Vid. Spelm. Treat. of Feuds* 30. *Seld. Notes on Fort.* 46. *Sir Tho. Smith de Rep. Ang.* 265. *Crag. de Jur. Feud.* 284, 301.

(d) The *Capitula* of the Barons and *Charter* of King *John*, permitting the Lord to take the iſſues and profits of the Land of his *Ward* without deſtruction and Waſt, and alſo directing when, and in what condition, he ſhould reſtore the Land, *&c.* unto him, plainly ſuppoſe (contrary to the Charter of *Henry* I.) the Lord's Title to *Wardſhip*.

(e) Vid. Mad. Hiſt. of the Exchеq. 221, 222.

(f) *Si conſtet* (ſays *Glanvil*) *eos* (*ſcil't Hæredes*) *eſſe Minores, tunc ipſi Hæredes tenentur eſſe ſub Cuſtodia Dominorum ſuorum, donec plenam habuerint ætatem, ſi fuerint Hæredes de Feodo Militari.* Glanv. Lib. 7. Cap. 9.

mandy (g), and the Opinions of Mr. *Camden* (h), and Sir *Henry Spelman* (i), that they were of *Norman* Original, and came from *Normandy* as a Branch of the Law of FEUDS or *Tenures:* Though they were in Truth at that Time a new Servitude peculiar to *Normandy* (k), and altogether unknown (ſays Sir *Henry Spelman)* (l) to other Countries that were governed by the *Feudal* Law.

(g) Cap. 33. De Gard D'orphelins, fol. 53.

(h) By an old Cuſtom, ſays Mr. *Camden*, derived from *Normandy*, and not (as ſome write) inſtituted by *Henry* the Third, when any one dies holding Lands of the King in *Capite* by *Knight-Service*, both the Heir, and the whole Eſtate with the Revenues of it are in *Ward* to the King, till he has compleated the Age of one and twenty, and then he may ſue out his *Livery*. *Camd. Introd. to his Brit.* 187.

(i) Spel. Treat. of Feuds 29. & Gloſſ. ad Verbum Warda.

(k) *Appert que ceſte Couſtume par la quelle le Roy a la garde des Orphelins tenans Fiefs nobles de luy eſt ſpeciale en Normandie, & eſt vray ſemblable avoir eſte introduite & receue en Angleterre, depuis que les Ducs de Normandie en ont eſte Roys. Vray eſt qu'en pluſieurs autres lieux de France, entre les Gens nobles le bail (qui vaut autant, a dire come garde) des mineurs vient a pere & mere & autres aſcendans, &c.* Vid. Terrien. Comment. du Droit, Civil De Duche de Normandie, fol. 187.

(l) Treat. of Feuds 46. Vid. Stry. Exam. jur. feud. Cap. 7. Q. 15, 21, 22. Schilt. Cod. jur. aleman. Cap. 55, 106. Com. 273, 296.

Hotoman

Hotoman therefore ſpeaking of the *Scotch Wardſhips*, calls them *acerbiora Relevia* (m), not knowing any other Title in the *Feudal* Law, that could comprehend or countenance them; and yet they do not ſeem to have obtained either here, or in *Normandy* without ſome Reaſon; for altho' it is certain that *Wardſhip* could be no Part of the Law of FEUDS, while they were Arbitrary, Temporary, or for Life only; yet when they became Hereditary, and did conſequently often deſcend upon Infants, who by reaſon of their Age, could neither perform nor engage for (n) the Services of the FEUD; and yet on Account of their Impotence ſtood clear of the Feudal Forfeiture for Defect of

(m) *Acerbiora Relevia illa ſunt* (ſays *Hotoman*) *quibus Scoti veterum Regum inſtitutis olim utebantur, nam cum ab uno Rege feuda omnia Recognoſcerent, Vaſallo Mortuo, prædiorum fructus omnes uſque dum Filius unum & viceſimum impleſſet Annum, Regibus Relevii cauſa tribuebant*, Werdas *autem vocant*. Hot. de verb. Feud. ad verb. Relevium.

(n) *Siquis deceſſerit filio impubere relicto, Fidelitatem nec ipſe, nec alius pro eo facere cogitur*. Feud. Lib. 2. Tit. 26. Sect. 4, 5.

Service

Service (o), *Wardſhip* of the *Land*, that is to ſay, the *Cuſtody* of the FEUD itſelf was committed to, or rather retained by the Lord, that he might out of the Iſſues and Profits thereof, provide a fit Perſon (p) to ſupply

(o) *Non eſt alia juſtior cauſa Beneficii auferendi quam ſi id, propter quod Beneficium datum fuerit, hoc ſervitium facere recuſaverit—Aliud eſt ſi forte ideo non ſervierit quia non potuerit, tunc enim Feudum non amittet.* Feud. Lib. 2. Tit. 24. Sect. 2. Vid. Hanneton. de Jur. Feud. Lib. 3. Cap. 11. p. 337, 338.

An Infant's Service however was according to the *Book* of *Feuds* to be done by ſome Body, though the *Text* doth not ſay who ſhall appoint the Perſon, but only ſays, that *Alius pro eo faciens ſervitium admittitur.* Feud. Lib. 2. Tit. 26. Sect. 5.——This Omiſſion in the *feudal Text*, leaving Room for Diſpute between the Supreme, and other Lords about the Nomination of the Perſon who ſhould do the Infant's Service, might poſſibly give Occaſion for the Declaration *int. Aſſiſ. Henry* II. *viz. Si Hæres de tali ætate non ſit quod armis uti poſſit ——Ille eum qui habebit in Cuſtodia ——Inveniet Hominem qui Armis uti poſſit in ſervitio Domini Regis, &c.* Wilkins Leg. Anglo-ſax. 333.

(p) *Cum ad Infantem Feudum devolveretur qui ex Impotentia debitum Domino ſervitium præſtare non valuit, injuſtum viſum eſt ut is Feodum amitteret; ſed nec illud juſtum ut quod pactum erat ſervitium, Dominus non gauderet. Quamobrem Majores noſtri æquum duxere, Feodum interim Domino reddi, ut donec Vaſſallus ad Arma Virilia potens eſſet, ipſe ſuum ſervitium curaret præſtari.* Spelm. Gloſſ. ad Verbum Werda. Crag. de jur. feud. 284.—— And the *Book* of *old Tenures* gives a double Reaſon for *Wardſhip*, (*viz.*) *que le Seignour ne perdra*

ſupply the Infant-Heir's Defect of Service, until he ſhould be of Age to do it himſelf (q). And howſoever unreaſonable Wardſhips may have appeared to us of late Years; yet if we conſider a FEUD, whether poſitive or fictitious, according to the Import and Deſign of the Term, and Policy itſelf, as a Kind of *Stipend* or Reward for actual Service, it cannot ſeem ſtrange that the Lord ſhould withhold the FEUD, or *Stipend* until his

perdra ceo que de droit il doit aver, & que le poiar de le Roialme de rien ne ſoit enfeble. Vid. old Tenures Tit. *Tenir per ſervice de Chivaler.* And the *Prerogative* by which the King had at Common Law the Lands of *Ideots* held of himſelf only, may very reaſonably be accounted for in the ſame Manner as *Wardſhip:* But it does not appear upon what Ground this *Prerogative* was extended by the Stat. *de Prærog. Regis Cap.* 9. (beyond the Notion of *Wardſhip)* to *Ideots* in general, whether holding of the King, or not, and to all their Lands of whoſe *Fee ſoever* they were holden. *Vid.* 2. *Inſ.* 14. *Bacon Hiſt. of Eng. Gov.* 281.

(q) *Tanque al age del Heire de* 21 *ans le quel eſt appel pleine age pur ceo que tiel Home per Entendement del ley neſt pas able de faire tiel ſervice de Chivaler devant l'age de* 21 *ans.* Lit. Sect. 103. 1 Inſ. 75. b. Vid. Cuſtum. de Norm. Cap. 33. de Garde D'orphelins: But an Heir *Female* ſhould not be in *Ward* after fourteen Years of Age, becauſe ſhe might at that Age marry a Man able (ſays *Littleton) de faire Service de Chivaler.* Lit. Sect. 103. Bract. Lib. 2. Cap. 37. Sect. 3. fol. 86. b. Crag. de Jur. Feud. 284.

Stipendiary or *Feudatary* ſhould be able to anſwer the Services, in View, or in Conſideration whereof it was Originally conferred.

As for the Cuſtody or *Wardſhip* of the Body, there is no clear feudal Reaſon to be given for it, and therefore we may ſuppoſe that our *Norman* Anceſtors might think it reaſonable, rather in regard to the Infant-Heir, than with reſpect to the Lord himſelf, that the Lord, who had the Cuſtody of the FEUD, the Eſtate and Livelihood of the Heir, ſhould likewiſe have the Care of his Body, and the Charge of his Maintenance: Beſides, the Lord was, no doubt, the propereſt Perſon to have the Care of his Education; becauſe he was moſt likely to qualify him for the Services of the FEUD, in which (though they were of public Concern) he was ſuppoſed to be moſt immediately intereſted (r).

As

(r) Vid. Forteſc. de Laud. LL. Ang. Cap. 44. Seld. Notes on Fort. 46. Smith de Rep. Ang. 264, 265. Cowel Inſ.

As for *Marriage*, the Lords of our *Engliſh Fees* might poſſibly take the Hint from *Normandy* (ſ): Tho' I muſt confeſs, that in the Senſe of our Law, in which it betokeneth the Intereſt of the Guardian in beſtowing a *Ward* in *Marriage* (t), and was underſtood to be a Beneficial Perquiſite of *Tenure*, I can find no expreſs Notices of it earlier than the Stat. of *Merton* (u): By the Cuſtom of *Normandy* indeed a Female Ward was to be married with the Licence of the Lord, and the Joint Conſent of him, her Parents and Friends (w): But the Lord had not the abſolute Diſpoſal of her, nor had he any Thing to do

Inſ. Lib. 1. Tit. 17. Sect. 2. 1 Inſ. 75. b. Bacon Hiſt. of the Eng. Gov. 148, 149.

(ſ) Vid. Spelm. Treat of Feuds 29, 30.

(t) 1 Inſ. 76. a.

(u) Cap. 6, 7.

(w) *Sè feme eſt in garde quand elle ſera en aage de marrier, Elle doibt eſtre marie par le Conſeil & Licence de ſon Seigneur & par le Conſeil & l'aſſentment de ſes Parents & Amis, ſelon ce que la Nobleſſe de ſon Lignage & la valeur de ſon fief le requerra.* Cuſt. de Norm. Cap. 33. fol. 55.

Note that *Parens* (according to the Lord *Coke* 1 Inſ. 80. b.) *eſt nomen generale ad omne genus Cognationis.* Vid. Spelm. Gloſſ. ad Verb. Parens.

with

with the *Marriage* of *Male Wards*, or any Intereſt in the *Marriage* of *Females*, but a bare Approbation of the Perſon who in Virtue of the *Marriage* was to become his *Feudatary* (x): By the Charter of *Henry* I. a Daughter of any of the King's Tenants was not even in the Life-Time of her Father to be married without the King's Privity; but then the King was to take nothing for his Conſent, nor could he reſtrain the Father from marrying her to any one that was not his enemy (y); but this Charter ſays nothing of the Marriage of Males, nor does it give the leaſt Colour or Countenance to any pri-

(x) *Au Mariage luy, (viz. de feme en garde) doibt eſtre rendu le Fief qui a eſte en garde———la temps de Mariage luy donne aage & delivre ſon Fief de garde* ———if her huſband be of Age. *Vid. Cuſtum. de Norm. fol.* 55.

(y) *Siquis Baronum vel Hominum meorum filiam ſuam nuptum tradere voluerit, ſive Sororem, ſive Neptim ſive Cognatam mecum inde loquatur; ſed neque ego aliquid de ſuo pro hac Licentia accipiam, neque ei defendam quin eam det, excepto ſi eam jungere velit inimico meo.* LL. H. I. Cap. 1. ——— Vid. Spelm. Treat. of Feuds 29. Glanv. Lib. 7. Cap. 12. p. 55. a. Bract. Lib. 2. Cap. 37. Sect. 6. p. 188. a.

vate

vate Profit or Advantage from the Marriage of Females; nay, ſo far from it, that the King expreſsly declares, that he would not accept any Thing for his Conſent (z), to the Marriage of a Female during the Life of her Father: And that after the Death of the Father, he would marry her with the Advice of his Barons (a), which plainly ſhews that Regard was then had to the Marriage of Females only, as to a Matter of publick Concern, and not of private Advantage. Our *Engliſh* Lords however by an extraordinary Conſtruction of *Magna Charta*, took upon them not only the abſolute Marriage of Female Wards, but of Males too (b); there was indeed ſome Reaſon (as

(z) The Words *neque aliquid de ſuo——accipiam* may be underſtood, not only to amount to a Declaration that nothing was due, but to a Declaration, that nothing ought to be taken, tho' voluntarily offered.

(a) *Si mortuo Barone vel alio Homine meo Filia hæres remanſerit, illam dabo Conſilio Baronum meorum.* LL. Hen. I. Cap. 1.

(b) Extending the Words *Hæredes in Magna Charta, Cap.* 6. (without Regard to the Cuſtom of *Normandy*, to

(as is ſuggeſted in the Charter of *Henry* I.) for their Conſent to the Marriage of Females, becauſe they might otherwiſe marry Enemies to the Publick (c), and "ſo the FEUDS "or *Fiefs* (ſays Sir *Henry Spelman*) "which were given for Service a-"gainſt them, ſhould be transferred "to them" (d). But as to Males, there is no feudal Reaſon for the Lord's Conſent to the Marriage of them (e), nor is there indeed any Reaſon, unleſs, that as it was a Part of the paternal Care (f), our *Engliſh* Lords, who had the Care of their

to the Charter of *Henry* I. or to the Uſage of former Times. *Vid. Glanv. Lib.* 7. *Cap.* 12.) as well to Male, as to Female Heirs.

(c) ——— *fuit primes defendu pur ceo que les heires femeles de noſtre terre ne ſe mariaſſent a nos enemys, & dounc il nous coviendroit lour Homage prendre, ſi eux ſe puſſent marier a lour volunte.* Britton, Cap. 67, p. 168. b. ——— *Sine ipſorum Dominorum diſpoſitione & aſſenſu Mulier hæreditatem habens maritari non poteſt* —— *Et hoc ideo ne cogatur Dominus Homagium capere de capitali Inimico.* Bract. Lib. 2. Cap. 37. Sect. 6. Vid. Glanv. Lib. 7. Cap. 12. Mirror 16, 17. 1 Inſ. 78. b.

(d) Spelm. Treat. of Feuds 29.

(e) *Nulla poterit eſſe cauſa in maſculo hærede, quare uxorem non ducat, quæ eſſe poſſit in Fœmina cum viro nubat.* Bract. Lib. 2. Cap. 38. Sect. 1.

(f) Vid. Lit. Sect. 114.

Per-

Perſons, might think themſelves under an Obligation to take Care of their Marriage: But how it ſhould come to paſs, that they ſhould not only claim the Diſpoſal of their Wards in Marriage, but the Profit of their Marriage, I cannot ſay; unleſs that, as Diſparagement was the only Reſtraint in *Magna Charta* (g), they thought themſelves at Liberty to make all Advantages they otherwiſe could of it: A Conſtruction ſo agreeable to the Times, that it was immediately countenanced, and in Effect eſtabliſhed by the Statute of *Merton* (h).

II. RELIEFS (i) were not Services,

(g) For *Magna Charta* (*Cap.* 6.) requires only, that *Hæredes maritentur abſque Diſparagatione*, omitting the additional Clauſe *in Charta Johannis*, *viz.* *Ita tamen quod antequam contrahatur Matrimonium oſtendatur propinquis de Conſanguinitate ipſius hæredis:* Which gave the next of Kin an Opportunity to prevent Diſparagement; which they loſt by this Omiſſion, and were, for ought I can ſee, left to lament it without any Redreſs, until the Stat. of *Merton*, *Cap.* 6. Vid. Lit. Sect. 107, 108.

(h) Cap. 6, 7.

(i) What they are, and why ſo called. *Vid. Sup. p.* 15. *in Marg. Bract. Lib.* 2. *Cap.* 36. *Sect.* 1. *Fleta Lib.* 3. *Cap.* 77. *Sect.* 1. 1 *Inſ.* 76. *a. Spelm. Treat. of Feuds* 33. *& Gloſſ. ad Verb. Relevamen.*

but Fruits of feudal *Tenure* (k), that were not arbitrarily introduced among us by the Conqueror, but were brought into *England* with FEUDS according to the Cuſtom of the feudal Law, and of other Nations, and "were (ſays Sir *Henry Spelman)* ſo va- "rious and uncertain, that the Lords "exacted what they liſted for it, when "the FEUD fell into their Hands up- "on the Death of their feudal Te- "nant, conſtraining the Heir, as it "were, to make a new Purchaſe of the "FEUD (l)," and although the Lord

(k) *Relief eſt un profit del Seigneurie.* 2 Ro. A. 514. D. 3.——*neſt un Service eins incident al Service.* Ibid. 515. D. 4. 3 Rep. 66. 1 Inſ. 83. a. And it appears from the Dialogue of the Exchequer, that Reliefs were not Services, and that it was doubtful in *Henry* II. his Time of what Nature they were; for the Author of that Dialogue ſpeaking of Reliefs ſays, that they were a Kind of Obventions, *quæ non videntur prorſus inter oblata computanda, ſed magis fines ad Scaccarium dicuntur.* ——And the ſame Author adds, that *ſunt qui credunt eos qui in releviis regi tenentur, nec Summoniti ſolvunt, Spontaneorum Oblatorum legibus obnoxios; ut cum ſolvendo non fuerint, careant impetratis: ac verius dici poteſt, ut ſicut de Pecuniariis pœnis fit, ſic fiat de Releviis; debita namque filiis ratione ſucceſſionis hæreditas a lege ſponte Oblatorum videtur excludere.* Gerv. Tilbur. Dialog. de Scacc. edit. per Madox, Cap. 21.

(l) Spelm. Treat. of Feuds 33.

Coke

Coke (m) ſuppoſes *Reliefs* to have been certain at the Common Law; Yet they were probably with us originally uncertain, as by the Feudal Law, and were no doubt on this Account one of the greateſt Grievances of *Tenure*: Inaſmuch as an unreaſonable *Relief* did in Conſequence amount to a Diſheriſon of the Heir (n): They ſeem however to have been reduced, ſome Time after the Eſtabliſhment of *Tenures*, to ſome Certainty by the Laws of *Wil-*

(m) The Lord *Coke* ſuppoſes that the lawful and juſt Relief mentioned in *Henry* I. his Charter to be paid by an Earl and Baron, was certain, *viz.* the fourth Part of the yearly Value of his Earldom or Barony, and that the ſecond Chapter of *Mag. Charta* was but a Reſtitution and Declaration of the ancient Common Law. 2 *Inſ.* 7, 8. And yet he elſewhere, (1 *Inſ.* 76. *a.*) ſays that the Relief of a Knight's Fee was, as ſome hold, certain by the Common Law, but that the Reliefs of Earls and Barons were uncertain, and were therefore called *rationabilia Relevia*, until the Stat. of *Mag. Charta*, *cap.* 2. limited them in certain.

(n) It is very likely that thoſe Hiſtorians, who ſay that the Conqueror diſinherited many of his Nobles without the Judgment of their Peers, point at arbitrary Reliefs, ſince they are the very firſt temporal Grievance (a Grievance therefore no doubt of the worſt Conſequence) that is redreſſed by the ſeveral Charters of *Henry* I. King *John*, and *Henry* III.

liam I. (o) *William* II. broke through theſe Laws, and exacted arbitrary *Reliefs*, as due by the Feudal Law: And therefore *Henry* I. in his Char-

(o) *De Relevio Comitis quod ad Regem pertinet*, VIII *Equi Ephippiati & frænis ornati*, IV *Loricæ*, & IV *Hammes* (*Galeæ* Wilkins) & IV *ſcuta* & IV *Haſtæ*, & IV *Enſes*, *les altres* IV *chaceurs* (*alii cæteri* IV *veredi* Wilkins) & *Palfrædi cum frænis & Capiſtris*. Vid. Leg. Gul. I. Cap. 22. apud. Lamb. de priſcis Angl. Leg. & Seld. Notes ad Eadmer. 180. & Tit. of Hon. 556.

De Relevio Baronis IV *Equi cum ſellis & frænis Ornati & Loricæ* II & II *Hammes* (*Galeæ* Wilkins) & *ſcuta* II & II *Haſtæ* & II *Enſes*, & *les altres* II *un chaceur* (& *alii cæteri* II, *unus Veredus* Wilkins) & *unus Palfrædus cum fræno & Capiſtro*. Vid. LL. Gul. I. Cap. 23. Ibid.

De Relevio Vavaſoris ad Ligium ſuum Dominum Quietus eſſe debet per Equum ſon piep (*patris ſui* Wilkins) *talem qualem habuerit tempore mortis ſuæ, & per loricam ſuam & per ſon Haume* (*per Galeam ſuam* Wilkins) *& per ſcutum ſuum, & per Haſtam ſuam, & per Enſem ſuum, & ſi adeo fuerit inermis ut nec equum habuerit nec arma, per centum ſolidos*. LL. Gul. I. Cap. 24. Ibid.

It may not be improper to obſerve upon theſe Laws, that if it ſhould ſeem ſtrange to any Body, that *William* I. ſhould contrary to the Cuſtumier of *Normandy* (*Cap.* 34. *de Relief. fol.* 56. *b.*) require *Reliefs* to be paid in Arms and Habiliments of War, inſtead of Money, Sir *Henry Spelman* (*Treat. of Feuds* 32.) ſays, that it is very probable that *William* the Conqueror raiſing the Form of the feudal Law in *England*, and drawing the *Saxon* Cuſtoms to cohere therewith as much as poſſible, did turn the *Daniſh* Law of *Heriots* (*Vid. Leg. Canuti Tit.* 69. *de Hereotis apud Lamb. de priſcis Ang. Leg. fo.* 123.) into this of *Reliefs*. And the rather becauſe the ancient feudal *Relief* was of this Nature. *Vid. Sup. p.* 15. *a.*

ter

ter declares, that an Heir ſhould not *redeem* his Land as in the Time of his Brother, but ſhould have it upon a *juſt* and *lawful Relief* (p), which is declared by one of his own Laws (q) to be very near the ſame with the *Relief* eſtabliſhed by the Laws of *William* I. (r) but if this be ſo, it may

(p) *Si quis Baronum meorum, Comitum vel aliorum, qui de me tenent, mortuus fuerit; hæres ſuus non redimet terram ſuam ſicut faciebat tempore fratris mei, ſed legitima & juſta relevatione relevabit Eam.* LL. Hen. I. Cap. 1. *Roll* ſuggeſts the Cauſe, as well as Effect of this Clauſe in *Henry* I. his Charter, *viz. Devant le temps de H.* I. *le Roy & auters Seigneurs uſoint a faire l' heires de lour mort tenants a* redeemer *lour terres*——*mes H.* I. *abrogate ceſt male Cuſtome & ordein l'heirs del mort tenants del Roy, & d'auters Seigneurs* relevarent *terras de Dominis ſuis, non* redimerent. 2 Roll. Ab. 514. D. 1, 2.

(q) *Sint relevationes ſingulorum ſicut Modus ſit, Comitis* VIII *Equi, quatuor ſellati & quatuor ſine ſella, & Galeæ* IIII, *& Loricæ* IIII *cum* VIII *lanceis & totidem ſcutis & Gladiis* IIII. *& centum Mancæ Auri. Poſtea Thayni Regis qui ei proximus ſit, quatuor Equi, duo ſellati & duo inſellati, & duo gladii, & quatuor lanceæ & totidem ſcuta & Galea cum Lorica, &* L *Mancæ Auri. Et Mediocris Thayni Equus cum apparatu ſuo & Arma ejus, &c.* Vid. Leg. H. I. Cap. 14. de relevationibus, Apud Lamb. de priſcis Ang. Leg.

(r) So that the Lord *Coke*, (2 *Inſ.* 8.) citing the above-mentioned Laws of *William* I. out of an ancient MS. in the Library of Archbiſhop *Parker*, not as Laws of *William* I. fixing *Reliefs*, but as Notices of the unjuſt *Reliefs* exacted in the Time of *William* II. and as ſuch widely

may ſeem ſtrange, that, notwithſtanding theſe Laws of *William* I. and this declaratory Law of *Henry* I. *Glanvil*, who wrote in the Time of *Henry* II. ſhould ſay (f), that the *Relief* of a *Knight's Fee* was C. Shillings, *de Baroniis vero nihil certum ſtatutum eſt, Quia juxta Voluntatem & Miſericordiam Domini Regis ſolent Barones Capitales de Releviis ſuis Domino Regi ſatisfacere:* But *Glanvil* is not to be underſtood, as if he meant that the *Relief* of a *Barony* was abſolutely uncertain (as by the Feudal Law all *Reliefs* originally were); but that a Commutation or Compoſition for the *Relief* was not certainly eſtabliſhed either by the Laws of *William* I. or of *Henry* I. as it was in the Caſe of the *Relief* of a *Knight*; for the Words *juxta Voluntatem Regis ſolent Barones Capitales de Releviis ſuis Do-*

widely different from the juſt and lawful *Reliefs* intended to be reſtored by the Charter of *Henry* I. was undoubtedly miſtaken.

(f) Lib. 9. Cap. 4. p. 71.

mino

mino Regi ſatisfacere import no more, than that, if the *Relief* of a *Barony* was not rendered but compounded for, the King muſt be ſatisfied for (or concerning) it to his Content: So that the Compoſition for the *Relief* and not the *Relief* itſelf, of an *Earldom* or *Barony* remained uncertain, until it was aſcertained by the Charters of King *John*, and of *Henry* III. (t) which, inſtead of the *Relief* eſtabliſhed by the Laws of *William* I. and *Henry* I. conſiſting of Horſes, Arms, and Things of the like Nature, reſtored the more ancient *Norman Relief* in Money (u).

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(t) Vid. Seld. Tit. of Hon. 553, 576.

(u) *Par toute Normandie relief eſt generalment determine en Fief de* Haubert *par quinze livres, en* Baronie *par Cent livres.* Cuſtum. de Norm. Cap. 34. de Relief, fol. 56. b. without any Diſtinction between an *Earldom* and *Barony* — King *John*'s Charter (according to the Copy I have of the ſuppoſed Original in the *Cotton* Library) diſtinctly mentions *Earls* and *Barons*, and yet makes no Difference between the *ancient Relief* de *Baronia Comitis* & de *Baronia Baronis*, fixing the *Relief* of both *(viz. de Baronia Comitis integra & de Baronia Baronis integra) ad centum Libras:* So that the Agreement between this Charter and the Cuſtumier of *Normandy* ſuggeſts, that the one was probably formed from the other.

Note too, that there are Copies of *Henry* III.'s Char-

The *Relief* of *Soccage* Lands was fixed by the 40th Law of *William* I. at a Year's Rent (w), and remains the ſame

ter ſtill extant, which are ſuppoſed much more ancient than the *Inſpeximus* of *Edward* I. in which, inſtead of the preſent Words *de Comitatu integro*, the Words *de Baronia Comitis integra* (as in King *John*'s Charter) are retained, and no Difference is made between the *Relief de Baronia Comitis & de Baronia Baronis:* But both are fixed as *in Charta Johannis ad centum Libras*, and it now appears from the Original Charter of *Henry* III. that in this Reſpect there is no Difference between the Charters of K. *John* and of *Henry* III.

(w) It muſt be obſerved, that by the Cuſtom of *Normandy*, no other *Fiefs* or *Fees* paid *Relief*, than ſuch as were held by *Homage*; for according to the *Cuſtum. de Norm. Cap.* 34. *fol.* 56. *b. relief & Hommage ſont auſſi comme conjoincts enſemble: Car par tout ou il ya relief, il convient que Hommage y ſoit: Combien que par tout ou il ya Hommage il ne convienne pas avoir relief. Bracton* therefore, having treated of *Reliefs* due from military *Fees*, proceeds upon this or a like Notion of Relief to inquire, *Si de Soccagio dari debeat Relevium, cum de Soccagio non competat Domino capitali cuſtodia nec Homagium, & ubi nulla cuſtodia, ibi nullum Relevium, ſed e contrario.* And concludes accordingly, *Quod de Soccagio non datur Relevium———ſit tamen* (ſays he) *de neceſſario Domino Capitali quædam præſtatio ab Hærede propter Dominium & Domini Recognitionem, & quæ prædictis rationibus dici non poterit Relevium, & quæ talis eſt, viz. Cum teneatur Sockmannus defendere tenementum ſuum erga Dominum ſuum per certum redditum———loco relevii in Recognitionem Dominii dabit tenens Domino ſuo, & Hæres una vice Redditum ſuum unius Anni duplicatum, ſed quod non ſolvat redditum, & poſtea duplicatum, ſed quod ſolvat redditum, & poſtea tantumden in Simplum.* (Bract. Lib. 2. cap. 36. Sect. 8.) And according to *Bracton*'s Notion, it is declared by the Stat. 28 *E.* 1. *of Wards and Relief*, that when any *Relief*

ſame to this Day: Although it is not taken Notice of in any of the Charters of *Henry* I. King *John*, or of *Henry* III.

III. AIDS called by Sir *Henry Spelman* Tribute (x), and by our old Authors *Auxilia*, were meer *Benevolences* rendered by a Tenant to his Superior or Lord, in Times of Difficulty and Diſtreſs (y), and were not of direct

is given, the *Wardſhip* is incident, and contrariwiſe.—And that a free *Sokeman* ſhall not give *Ward* or *Relief*; but that he ſhall double his Rent after the Death of his Anceſtor. But this Stat. of *Edward* I. and *Bracton* thus oppoſing the double Rent to be paid by a *Soccage* Tenant to *Relief*, muſt be underſtood to ſpeak of the *Relief* reſtored by *Magna Charta*, *Cap.* 2. which was but a fourth Part of a Year's Value, and extended only to military Tenants; whereas a *Soccage* Tenant remained ſubject according to the 40th Law of *William* I. to *Relief* at a whole Year's Rent, *viz. eorum qui fundum ſuum tenent ad Cenſum ſit rectum Relevium tantum, Quantum Cenſus annuus eſt.* And a Year's Rent, thus eſtabliſhed as the *rectum Relevium* of Lands held by Soccage Tenure, hath been conſtantly taken as a *Relief* ever ſince. *Vid. Glanv. Lib.* 9. *Cap.* 4. *fol.* 71. *a. Fleta Lib.* 3. *Cap.* 17. *Sect.* 11. *Lit. Sect.* 126, 127. 2 *Inſ.* 232. 2 *Ro. Ab.* 515. *E.* 2, 3.

(x) Treat. of Feuds 59.

(y) *Sunt quædam Conſuetudines quæ ſervitia non dicuntur, nec concomitantia ſervitiorum, ſicut ſunt rationabilia auxilia ad filium primogenitum militem faciendum, vel ad filiam primogenitam maritandam, quæ quidem auxilia fiunt de gratia & non de jure, & pro neceſſitate & Indigentia Domini Capitalis. Nunquam igitur exigitur*

rect Feudal Obligation (z), but firſt obtained out of a pious Regard to the Perſon, and Occaſions of the Lord: The Kind therefore, as well as the *Quantum* of every *Aid*, was originally as various and uncertain, as the particular Occaſions of every diſtinct Lord, and as the Abilities and Diſpoſition of each particular Tenant; But as *Benevolences* or *Aids* grew frequent, the more uſual *Renders of Regard* became in many Countries eſtabliſhed *Renders of Duty* (a). Thus in *Normandy* the three moſt uſual and frequent Aids, that is to ſay, to make the Lord's eldeſt Son a Knight, to marry his eldeſt Daughter, and to ranſom his Perſon, became due and payable to the Lord, as fixed and eſ-

tur Auxilium, niſi præcedat Neceſſitas, nec tenetur aliquis ad hujuſmodi Auxilium præſtandum niſi ex Indigentia Domini ſui Capitalis, & ex eo quod eſt Liber Homo ſuus. Bract. Lib. 2. Cap. 16. Sect. 8. Fleta Lib. 3. Cap. 14. Sect. 9.

(z) For, according to *Bracton* and *Fleta*, *Hujuſmodi Auxilia ſunt perſmalia & non Prædialia.* Ibid. Vid. ſup. p. 41, 42.

(a) *Quod ex gratia primum largiebatur, Jure poſtea Exigitur, & pro Voluntate Dominorum.* Spelm. Gloſſ. ad Verb. Auxilium.

tabliſhed

ſtabliſhed Aids (b); and beſide them there was one of an inferior Nature, which reſpected only inferior Lords, and that was an *Aid* to enable the Lord to pay his Relief, and was therefore called *Aide de relief* (c); we became not only ſubject to the three capital *Norman Aids* (d), but to the *Aide de Relief* likewiſe (e): And

(b) *En Normandie a trois chevelz Aides (qui ſont appellez Chevelz, pource que ils doibuent eſtre payez aux chief Seigneurs) Lun eſt* ——— *faire laiſne filz de ſon Seigneur Chevalier. Le ſecond a ſon ainſnee fille marier, Le tiers a rachapter le corps de ſon Seigneur de priſon, quand il eſt pris pour la Guerre au Duc.* Cuſtum. de Norm. Cha. 35. fol. 57. b.

(c) *Aide de Relief eſt due quand le Seigneur meurt, & ſon Heir relieve vers celuy de que il tenoit ſon fief, & ceſt Aide doibt eſtre faict per demy relief.* Cuſtum. de Norm. Cap. 34, fol. 57. a.

(d) Vid. Seld. Jan. 65. Epin. 18. Madox Hiſt. of the Excheq. 396.

(e) Inferior Lords had alſo, ſays Mr. *Madox (Hiſt. of the Excheq.* 428.) of their Tenants *Aid* to enable them to pay the Fine for their Relief or Seiſin of their Inheritance.———And that ſuch *Aid* was taken in *Henry* II.'s Time appears from *Glanvil* (Lib. 9. Cap. 8.) *viz. Poſtquam convenerit Inter Dominum & Hæredem tenentis ſui de rationabili relevio dando & accipiendo, poterit Idem Hæres rationabilia Auxilia de Hominibus ſuis inde exigere.* ———And that the like Aid was taken in *Scotland*, appears from *Crag. (de Jur. Feud.* 213.) *viz. In relevio pro ſua terra ſolvendo, poſt expletam cuſtodiam vaſallus Dominum Juvare tenetur.*

thus

thus far our Anceſtors may be ſaid to have gone into the *Norman Notions* of *Aid:* But they did not ſtop here; for it appears by ſeveral Inſtances in the Time of King *John*, that they carried their Notions of *Aid* a good deal farther; inſomuch that inferior Lords took of their Tenants *Aid* not only to enable them to pay their Fines made with the King, but to pay their Debts (f) likewiſe: And it was doubtful in *Henry* II.'s Time, whether Lords might not require *Aids* towards their military Expeditions (g), but this Doubt was ſettled, and the two inferior Aids above-mentioned were, together with the *Aide de relief*, effectually aboliſhed by the following Clauſe of King *John*'s Charter, *(viz.) Nos non concedemus de cæ-*

(f) Vid. Madox Hiſt. of the Excheq. 428.

(g) *Utrum vero ad guerram ſuam manutenendam poſſint Domini hujuſmodi Auxilia exigere Quæro. Glanv. Lib.* 9. *Cap.* 8. And that ſuch Aids were taken in other Countries, appears from *Du Freſne.* Gloſſ. and Verb. Auxilium Tit. Auxilium pro Militia Domini.

tero

tero alicui quod capiat Auxilium de liberis Hominibus ſuis, niſi ad corpus ſuum redimendum, & ad faciendum primogenitum filium ſuum Militem, & ad primogenitam filiam ſuam ſemel Maritandam, & ad hæc non fiat niſi rationabile Auxilium.

Whilſt inferior or meſne Lords did, as above, under the Notion of *Aid*, impoſe upon their Tenants, the King, the ſupreme Lord, was not behind hand with them, but he demanded and had of them, and of all other his Tenants in *Capite*, various *Dona* or *Aids* (h), that were not warranted by the *Norman* Notions of *Aid*, nor could be inferred from any juſt Notion of *Tenure:* Theſe *Dona* or *Aids* therefore were likewiſe reſtrained by the following Clauſe of King *John*'s Charter, *(viz.) Nullum — Auxilium ponatur in regno noſtro niſi per Commune Conſilium Regni noſtri, niſi*

(h) Vid. Madox Hiſt. of the Excheq. 417—421.

ad

ad Corpus noſtrum redimendum, & primogenitum filium noſtrum Militem faciendum, & ad filiam noſtram primogenitam ſemel Maritandam, & ad hæc non fiat niſi rationabile Auxilium ——Et ad Habendum Commune Conſilium regni de Auxilio aſſidendo, aliter quam in tribus Caſibus prædictis ——Summoneri faciemus Archiepiſcopos, &c. This Clauſe is omitted in *Henry* III.'s Charter, and the old *Aids* were again revived and taken, until the 25th *Edward* I. when this important Clauſe of King *John*'s Charter was effectually revived or reſtored by the Stat. 25 *Edward* I. *Cap.* 5, 6. declaring and granting "That the Aids, "Taſks, or Priſes, which had been "given by his People before-time of "their own Grant, and good Will, "ſhould not be drawn into a Cuſ-"tom for any Thing that had been "done, notwithſtanding any Roll or "Precedent that might be found "——And that he would from "thence-

" thenceforth take no ſuch Aids,
" Taſks nor Priſes, but by the com-
" mon Aſſent of the Realm, and for
" the common Profit thereof, ſaving
" the ancient Aids and Priſes due
" and accuſtomed." Theſe *ancient Aids* were (according to the Lord *Coke)* (i), the *Aids pur file marier*, & pur *faire fitz Chevalier*; which were certain by the Cuſtom of *Normandy* (k), but were with us arbitrary and uncertain (l) until the Statute of *Weſtm.* 1. *Cap.* 36. fixed the *Aid* of a *Knight's Fee* at 20 *s.* and of *Soccage* Lands to the Value of twenty Pounds a Year, at 20 *s.* and ſo *pro*

(i) 2 Inſ. 529.

(k) *Ces Aides, (viz. les trois Chevels Aides) ſont payez en aulcuns fiefs a demy relief, & en aulcuns fiefs a tiers de Relief. Il ya aulcuns fiefs en quoy les vavaſſouries ſeulent payer dix ſols de Aide.* Cuſtum. de Norm. Cap. 35. fol. 58. b.

(l) As appears by the Preamble of the Stat. of *Weſtm.* 1. *Cap.* 36. *viz. Pur ceo que avant ceux heures ne fuit unques reaſonable Aid a faire leigne fits chevaler, ne a leigne file marier miſe en certein, ne quant ceo devroit eſtre priſe, ne quel heure, per quoy les uns leverent Outragious Aide, & plus toſt que ne ſembleit meſtier, dount la People ſe ſentit greve Purview eſt, &c.* Vid. 2 Inſ. 232. Seld. Tit. of Hon. 649.

rata. But this Statute was not underſtood to extend to the King, and therefore he levied *Aids* of this Nature afterwards by an higher Rate (m), until he was reſtrained by the Statute 25 *Edward* III. *Cap.* 11. which declares, that " reaſonable Aid to " make the King's eldeſt Son a " *Knight*, and *marry* his eldeſt " Daughter, ſhall be demanded, and " levied after the Form of the Statute " thereof made, and not in other " Manner, that is to ſay, of every " *Knight's Fee* holden of the King " 20 *s.*——and of every twenty " Pounds of Land holden of the " King in *Soccage* 20 *s.* and no " more."

The Statute of *Weſtm.* 1. takes no Notice of the *Aid* ad *Corpus redimendum*, nor doth the Lord *Coke*, or any of our ancient Law-Books mention any ſuch *Aid* (n), but on the contrary

(m) Vid. Seld. Tit. of Hon. 650. F. N. B. 82. F.

(n) Mr. *Selden* (*Tit. of Hon.* 649.) ſays, that he doth not remember that there is any Mention, in any of our publiſhed

contrary, they confine the *ancient Aids*, ſaved by the Statutes of *Weſtm.* 1. and 25 *Edward* I., to the *Aids* pur *faire fits Chevalier* & *file marier* only (o); and yet the *Aid ad Corpus redimendum* was one of the ancient Aids expreſſed in the Charter of King *John*, and, although it is not mentioned in the Statute of *Weſtm.* 1., might, and did no doubt re-

publiſhed Law-Books, of the Aid for Ranſom of the Lord, though by the Way (ſays he) in the MS. Years of *Edward* the Firſt, a Releaſe made by one *Robert* of *Bentham*, to the Abbot of *Ford* of all Services, *forſpris ſuit real & reaſonable Aide, pur luy raindre hors de priſon, ou ces heires, quel heure qu'ils fuiſſent en priſones*, is pleaded in Bar of an Avowry; and ſince Mr. *Selden* wrote, Juſtice *Croke* in Mr. *Hampden*'s Caſe ſays, that the ancient Aids ſaved by the Stat. 25 *Edward* I. were *ad redimendum corpus, ad filium primogenitum militem faciendum, & ad filiam primogenitam maritandam*——— And the Lord *Hale* in his *Analyſis* mentions this Aid *ad corpus redimendum*, as a Branch of the King's extraordinary temporal revenue.

(o) The *Aid ad corpus redimendum* was, in the Opinion of *Crag.* dropt likewiſe in *Scotland*; for he ſays, that *Dominum in filia primogenita elocanda opibus juvare tenetur (Vaſallus) & etiam ut ejus primogenitus equeſtri Dignitate decoretur, & pro his duobus Dominus pecuniarum opem exigere poteſt——In aliis Dominum pecunia juvare non tenetur Vaſallus, licet ſint qui Dominum captum in Bello, quod ſine ſua Culpa contraxerat, a Vaſallo, ut redimatur ab hoſtibus, juvari putant debere.* Vid. Crag. de jur. Feud. fol. 213.

main (p), notwithſtanding that Statute, which meant only to regulate and aſcertain the *Aids pur faire*

(p) There is a notable Record of the 17 *Edward* II. printed at large by Mr. Madox (*Hiſt. of the Excheq. fol.* 428. in *Marg.*) which proves that the *Aid ad corpus redimendum* was in thoſe Days, *tam naturali æquitate quam ex fidelitatis debito*, demandable, and which, at the ſame Time that it proves this, ſuggeſts the original Nature of Aids in general; I ſhall therefore give it the Reader as I have it from Mr. *Madox*, viz. *Rex Univerſis & ſingulis tenentibus Johannis de Britannia Comitis Richemundiæ Conſanguinei noſtri cariſſimi, ſalutem. Recolentes non ſine Cordis amaritudine, qualiter præfatus Conſanguineus noſter dum noſtris Obſequiis intendebat, per inopinatum & repentinum Scotorum Inimicorum & Rebellium noſtrorum Aggreſſum, captus extitit, & ad partes Scotiæ ductus per eoſdem, & adhuc penes ipſos eſt detentus, nec ab eorum manibus ſine magna & intolerabili Redemptione poterit deliberari, de ipſius Anguſtiis eo fortius moleſtamur, quo noſtris affectibus intimius conjungitur, & ipſius fidelitatis & Induſtriæ ſemper in noſtris agendis evidentius probavimus puritatem; Et quia ad Deliberationem Dicti Domini veſtri a manibus dictorum Inimicorum tam naturali æquitate quam ex fidelitatis veſtræ debito, manus extendere tenemini adjutrices: Vos & quemlibet veſtrum rogamus & requirimus ex affectu, quatenus unuſquiſque veſtrum juxta facultates ſuas, & quantitatem tenuræ ſuæ, pro Redemptione dicti Domini veſtri, tale & tantum ſubſidium ſtudeat miniſtrare, ut Idem Dominus veſter, veſtro Auxilio mediante, a dictorum Inimicorum manibus celeriter deliberari valeat, de quo veſtram poſſimus Benevolentiam & fidelitatem erga dictum Dominum veſtrum ex merito commendare, & vobis etiam grates referre debeamus; Et ut Idem Dominus veſter, cum redierit, veſtris profectibus, ob impenſum ſibi a vobis in tanto Neceſſitatis articulo præſidium, ſpecialiter aſtringatur. Teſte Rege apud Grenhou, primo die Septembris, per ipſum Regem.* Pat. 17 E. 2. p. 1. M. 15.

fits

fits Chevalier, & *file marier*; becauſe they were not only grown exceſſive, but were taken oftner (ſays the Statute) than ſeemed neceſſary, and were become, by reaſon of their Frequency, as well as Exceſs, too great a Grievance, and of too much Importance to remain longer uncertain: Whereas the *Aid* ad *Corpus redimendum* was leſs frequent, and by no Means capable of any Certainty, Reſtriction, or Exceſs; it being neceſſary, and of the higheſt Conſequence, with Regard eſpecially to the Supreme Lord, that the Lord, as often as he ſhould be taken Priſoner of War, ſhould at any Rate be ranſomed.

IV. When a FEUD or Fee determines for want of Heirs, or *propter Delictum tenentis*, the Land falls back (q) to the Lord, and the Land returning

(q) Thus, in the Language of *Glanvil* and *Bracton*, *revertitur terra ad Dominum Capitalem vel ad rectum Dominum, ſcil't ad ipſum de cujus feodo eſt.* Vid. Bract. L. 3. fol. 130. L. 4. fol. 160. b. Glanv. L. 7. Cap. 17. p. 59.

returning to the Lord upon ſuch Determination of the *Fee* or *Tenure* is called an *Eſcheat*, and is as ſuch reckoned by our *Engliſh* Lawyers (r) among the Fruits or Perquiſites of *Tenure*, though it cannot, properly ſpeaking, be a Fruit of *Tenure*; the Land or Tree itſelf, ſays Sir *Henry Spelman*, reſulting to the Lord upon a Determination of the *Fee* (ſ).

Sir *Henry Spelman* (t) divides Eſcheats into *Regal* and *Feodal*. "*Regal* "(ſays he) are thoſe Obventions and "Forfeitures, which belong generally "to Kings, by the ancient Rights "of their Crown, and Supreme Dig-"nity. *Feodal*, which accrue to eve-"ry *Feodal* Lord, as well as to the "King, by Reaſon of his *Seigniory*." This Diviſion is indeed agreeable enough to the general Import of the

p. 59. a. And *Bracton* in another Place (*L.* 5. *Cap.* 6. *fol.* 375.) ſays that *Reaſcendit ad Capitales Dominos a quibus primo proceſſit.*

(r) Hale Anal. 54.

(ſ) Treat. of Feuds 37.

(t) Treat. of Feuds ibid.

Word

Word Eſcheat, as formed from the *French* Word *Eſcheoir* to happen, and primarily ſignifying any Thing coming accidentally, or by Chance (u), and in ſuch Senſe comprehending caſual Obventions and Forfeitures of all Kinds. But ſtrictly ſpeaking according to the legal Notion of an *Eſcheat*, it imports ſomething happening, or returning to the Lord upon a Determination of *Tenure* only; and in this Senſe all *Eſcheats*, even to the King, are properly *Feudal*, and ſuch Lands or Tenements, as are not held immediately of the King, and yet happen to him upon the Commiſſion of any *Treaſon*, are not *Eſcheats* (w), but Forfeitures (x), which were given to the

(u) Spelm. Gloſſ. ad Verbum Eſchaeta.

(w) Tho' the Lord *Verulam* (in his Treatiſe of the Uſe of the Law, *p.* 34.) calls them *Royal Eſcheats*.

(x) The Statute 25 *Edward* III. *Cap.* 2. plainly makes this Diſtinction between *Eſcheats* and *Forfeitures*, declaring, that in the Caſes of *High Treaſon*, the *Forfeiture of Eſcheats* pertaineth to the King, as well of the Lands and Tenements holden of others, as of himſelf; and that in Caſes of *Petit Treaſon*, the *Eſcheats* ought to pertain to every Lord of his own *Fee*.——So that in the Clauſe relating to *Forfeitures* for *High Treaſon*, *Eſcheats* and *Forfeitures* are plainly diſtinguiſhed; inaſmuch as *Eſcheats*

the King by the Common Law (y), and do not depend upon the Law of FEUDS or *Tenures* (z), but upon *Saxon* Laws,

Eſcheats themſelves are for ſuch Treaſons declared to be forfeited ——— And the Lord *Coke* (2 *Inſt.* 64.) obſerves this Difference between them, ſaying, that where a Lord is attainted of *High Treaſon*, there the King hath the Land by *Forfeiture*, of whomſoever the Land is held, and not in reſpect of any *Eſcheat*, by Reaſon of any *Seigniory*. *Vid. Bro. Tit. Eſchete*, 14 *Mo.* 160. ——— Upon this Difference we may eaſily account for *Gavelkind* Lands being forfeitable for *Treaſon*, though they do not *eſcheat* for *Felony*; for though the Lord may connive at or diſpenſe with all the *Cauſes of Eſcheat*, (*poteſt Dominus feloniam remittere*. Zaſius in uſus feud. Cap. 10. fol. 95.) or might remit the *Eſcheat* itſelf as a Perquiſite of *Tenure*; yet he could not diſpenſe with the publick Laws of *Forfeiture*, or with Offences againſt any other Perſon than himſelf.

(y) Hale Anal. 110.

(z) For according to *Zaſius*, by the Feudal Law, *Si Subvaſallus majorem Dominum, i. e. eum, cujus eſt feudum ratione directi Dominii, offendat, eo caſu quo Offenſionis Crimen privationem inducit, Feudum non ad Dominum offenſum, ſed ad Vaſallum qui ſubfeudârat revertitur.* ——— *Si Vaſallus ea ſpecie deliquerit, quod bona ſua publicanda vel Confiſcanda venirent, tunc ſecundum Seniorem Opinionem Feudum non Confiſcabitur.* Zaſius in uſus feud. Cap. 10. fol. 92—100.

By the Cuſtom of *Normandy* indeed all Forfeitures for Treaſon were given to the Duke, but not ſo abſolutely as they are given to the King by the Common Law of *England*; for though by the Cuſtom of *Normandy*, if a Man was attainted of High Treaſon, the Duke ſhould have all his Poſſeſſions. *Cuſtum. de Norm. Cap.* 14. *fol.* 23. *a.* Yet *ſe l'homme a heritaige tenu d'aultres Seigneurs le Roy doibt bailler hommes au Seigneurs de qui les heritaiges ſont tenuz quils facent leurs debuoirs Seigneuriaulx*,

Laws (a), that were made long before the Introduction of *Tenures*, and which prevail even to this Day: and though they may ſeem ſevere upon the meſne Lord in defeating his *Seigniory*; yet as he had failed of that Caution and Regard, that was due to the Publick in the Choice of his Tenant, he was not altogether blameleſs (b), nor was he therefore deprived without Reaſon. And it is farther obſervable, that the Law hath inflicted a Penalty ſomewhat of the like Kind upon the meſne Lord, even where the Tenant is guilty of *Felony* only: for though the Land eſcheats, as by the Feudal Law it

Seigneuriaulx, & payent les Rents de leurs Fiefs. Le Stille de proceder en Norm. 76.

(a) By the Laws of *Alfred* and *Canutus*, a Traitor ſhould forfeit Life, Lands, and Goods——*Qui Capiti & ſaluti Regis perfidioſe ſive ſolus, ſive ſervis aut Sicariis mercede conductis ſtipatus Inſidiabitur, vita & fortunis ejus (vita & Rebus ſuis) omnibus privator (plectitor.)* LL. Alvredi. Cap. 4. LL. Canuti Cap. 54. apud Lambard. de priſcis Angl. Leg. Vid. Saltern. de Antiq. Brit. Leg. Cap. 10.

(b) For Lords were anciently in many Reſpects anſwerable for the Miſbehaviour of their Tenants, *Vid. LL. H. I. Cap.* 8. 41, 59, 86. *apud Lambard. & inf.* 146.

ought, to the immediate Lord; yet, as the Crime affects the publick Peace, and the Lord may be ſuppoſed, for want of due Care in the Choice of his Tenant, to be in ſome Meaſure blameable, the King ſhall have the Land a Year and Day (c) to the Prejudice of the Lord.

Having thus far treated of the Fruits incident to, or ariſing from *Tenure*, I ſhall now ſuggeſt ſomething concerning *Eſcuage*, which the Lord *Hale* (d) reckons among the Perquiſites of *Tenure*, and, although I do not take it to have been of the Nature of a Perquiſite, yet I ſhall follow him ſo far as to conſider it in this

(c) Vid. Magna Charta, Cap. 22. 2 Inſ. 36, 37. Stat. de Prærog. Regis 17 Edw. II. Cap. 16. Staundford's Pleas of the Crown, Lib. 3. Cap. 30.

This is agreeable to the Cuſtumier of *Normandy*, *Cap.* 24. *fol.* 36. *b.* where it is ſaid, that *Le Duc de Normandie aura ung an les terres aux damnez & les yſſues: Et apres doibuent eſtre rendres a ceulx qui ils en avoient faict Hommage, & de qui ilz tiennent nu a nu*——— And *in le Stille de proceder en Normandie*, *fol.* 76. it is ſaid *ſe l'homme eſt condemne par la Juſtice du Roy. Le Roy doibt avoir la premiere annee de la revenue des Heritaiges au condemnè.*

(d) Anal. 54.

Place;

Place; the rather, becauſe it ſeems to be one of the moſt obſcure and unintelligible Branches of *Tenure.*

It is obſervable, that the *Author* of the *old Tenures*, and *Littleton* do both of them, in the Order and Diſpoſition of their ſeveral Treatiſes of *Tenure*, conſider *Eſcuage* and *Knight-Service* as ſeveral Services, and under diſtinct Titles; and that *Littleton* doth notwithſtanding confound and blend them together in ſuch a Manner, that it is difficult to collect from him any real Difference or Diſtinction between them: and yet we cannot reaſonably imagine that they could be thus diſtinguiſhed in Point of Title, if they were meer Synonymies, and there was no other Difference between them, than in Point of Sound. It muſt indeed be confeſſed, that none of our Law-writers have ſo clearly diſtinguiſhed them, as might be wiſhed or expected: and yet, if we conſider *Eſcuage* as we ought, either 1. as a *Service*,

or

or 2. as a *Fine* or *Commutation* for Service, there will appear to have been a very conſiderable Difference between them.

1. It is plain that *Eſcuage* was a *Service*; for according to the *old Tenures* (e), *Tenir per Eſcuage*, (that is to ſay by the Service of *Eſcuage*) *eſt tenir per ſervice de Chivaler*—And according to *Littleton* (f) *tiel Tenant que tient ſa terre per Eſcuage tient per Service de Chivaler* (g), but Eſcuage was not

(e) Tit. Tenir per Eſcuage.

(f) Sect. 95.

(g) We are not neceſſarily to underſtand theſe Authors as if they meant that a Tenant by *Eſcuage* was a direct Tenant by *Knight-Service*, and held by the perſonal Service of a *Knight*, or Military Tenant; or that they really mean more than that a Tenant by *Eſcuage* was eſteemed as a *Knight*, and that the *Tenure* itſelf was, on Account of its Subſerviency to the military Policy of the Nation, reſpected as a military *Tenure*, or *Tenure* by *Knight-Service:* This was *Fleta*'s Senſe of *Eſcuage*, who ſays (*Lib.* 3. *Cap.* 14. *Sect.* 7. *fol.* 198.) that *Scutagium* ——— ratione Scuti pro *feodo militari reputatur* —— *& feodum* dici *debet militare.* This Conſtruction of *Littleton*'s Deſcription of *Eſcu ge* is agreeable to the moſt obvious Conſtruction of the like Deſcription of *Grand Serjeanty*, *viz. touts que teignent de Roy per grand Serjeanty, teignont de Roy per Service de Chivalrie, &c.* (Lit. Sect. 158.) And yet the Service of a Tenant by *Grand Serjeanty* was not neceſſarily Military, but might

not (as *Littleton* intimates (h)) a direct perſonal Service of Attendance upon the King in his Wars, nor was it due upon all military Occaſions, as *Knight-Service* was, but it was a *pecuniary* Aid or Contribution reſerved (i) by particular Lords, inſtead, or in lieu,

as well be a meer Service of *Honour* to be done in Time of *Peace*, (*Lit. Sect.* 153.) nor was ſuch Tenant liable to all the Conſequences of *Knight-Service*, inaſmuch as he was not bound to pay *Aid*, (2 *Inſ.* 233.) or *Eſcuage*, (*Lit. Sect.* 158. 1 *Inſ.* 105. *b.*) becauſe his Service was to be done, ſays *Littleton*, (*Sect.* 153.) *en ſon proper perſon*, and notwithſtanding all this, he was ſaid to hold by Knight-Service, that is to ſay, by as high a Service, and of the ſame Account as Knight-Service; but a Tenant by *Knight-Service* properly ſpeaking he was not; for if he had, he could not have been exempted from *Aid* by any Conſtruction of the Stat. *Weſtm.* 1. *Cap.* 36. nor could he have been deprived of the Benefit of *Magna Charta*, *Cap.* 2. which reſtrained the *Relief* of all Tenants by *Knight-Service* to a fourth Part of a Year's Value: Whereas the *Relief* of a Tenant by *Grand Serjeanty* was always a whole Year's Value of the Land at leaſt. *Lit. Sect.* 154. 2 *Inſ.* 10.

(h) Sect. 95, 96.

(i) That Eſcuage, conſidered as a Service, was a reſerved pecuniary Service, may be collected from *Bracton*, who calls it *Servitium forinſecum, quamvis ſit in Charta de Feoffamentis* expreſſum, *& nominatum* —— *& per ſolvitur ratione tenementorum non Perſonarum.* Bract. Lib. 2. Cap. 16. fol. 36. a. And that it was a reſerved Service may likewiſe be collected from *Littleton*, who ſays that they, who hold by grand Serjeanty, hold by Service of Chivalry —— But that the King ſhould not have

lieu, of perſonal Service, the better to enable them to bear the extraordinary Expence of their own Attendance and Warfare, when, and as often as, the King ſhould make War upon *Scotland* or *Wales*, or upon any other Foreign Country, if the *Tenure* was ſo *expreſſed* (k): But as the Quality and Quantity of the Lord's Ser-

have Eſcuage, *Sils ne teignont de luy per Eſcuage*, that is to ſay, unleſs Eſcuage was expreſly reſerved. *Lit. Sect.* 158. *Vid. Mad. Hiſt. of the Exchеq.* 452.——And what mightily confirms this Notion of *Eſcuage* is that *Eſcuage* in this View anſwers the *Norman Aide d'loſt* mentioned in the *Cuſtumier*, viz. *Len doibt Scavoir que il ya aulcuns fiefs de Hautbert qui doibuent a leur Seigneur le Service de l'oſt, que doibt eſtre fait a Prince, les autres doibuent l'Aide de l'oſt, ceulx qui doibuent le Service ſont tenus a le faire en l'oſt: Ou envoyer perſone pour ceulx qui le face avenaument, Ceulx qui doibuent l'Aide nen doibuent point rendre ne la lever, devant que le Prince leur ait ottroie la Quantite de l'Aide du fief.* Cuſtum. de Norm. Cap. 44. fol. 66. b. Terrien Com. du Droit civil de Duche de Norm. Liv. 3. Cap. 10. fol. 109.

(k) According to the Book of *Tenures Tit. Eſcuage* —— *Eſcuage eſt proprement pour ſuſteiner le guerre perenter Engleterre & ceux de Eſcoſe, au de Galeys: Et non pas perenter auters terres, pur ceo que les* avandits *terres ſerront de droit appendant a la Royalme d'Engleterre. Littleton* indeed (*Sect.* 95, 97, 100, 101, 102.) mentions only *Scotland*; but the Lord *Coke* ſays, that *Scotland* is put but for an Example; for that if the *Tenure*, (*i. e.* the Service reſerved) be *in Walliam, Hiberniam, Vaſconiam, Pictaviam, &c.* it is all one. *Lit. Sect.* 155. *Vid. Selden Notes ad Hengham* 113.

vice

vice abroad was occaſional and uncertain, the *Quantum* of this *Aid* was ſeldom fixed and aſcertained by the Reſervation, but was uſually reſerved in ſome Proportion (l) to the Fine or Satisfaction, that the King ſhould from Time to Time receive for and in lieu of the actual Service of ſuch of his Tenants in *Capite*, as failed him in theſe Expeditions (m). This Aid and Fine were both of them called Eſcuage *a Scuto*, *Quod aſſumitur* (ſays *Bracton)* (n) *ad Servitium militare, viz.*

(l) Vid. Lit. Sect. 98, 100.

(m) *Exprimitur quandoque ſic faciendo inde mihi & hæredibus meis ad Scutagium cum Evenerit, quantum pertinet ad feodum unius Militis.* Fleta Lib. 3. fol. 198. Vid. Bract. Lib. 2. Cap. 16. fol. 36. a.

(n) Eſcuage or Scutage was not ſo called, becauſe it was properly ſpeaking *Servitium Scuti:* But it was *Servitium a Scuto dictum* (Somn. Gloſſ. ad X. Script.) *quia pertinens ad Scutum*, (Bract. Lib. 2. Cap. 16. fol. 36. a. Fleta Lib. 3. fol. 198.) *& quia Nomine Scutorum Solvitur.* Gervaſ. de Tilbur. Dial. de Scacc. apud Mad. fol. 25.

It may here be noted that Sir *Henry Spelman (Treat. of Feuds, fol.* 36, 37.) ſays that the Word *Scutagium*, and that of *Eſcuage*, was of ſuch Novelty, that it was not to be found among the Feudiſts, no, not among the *French* or *Normans* themſelves: And yet that Fines or Satisfaction for Defect of Service were frequent, and eſtabliſhed in many Countries, under the Names of *Hoſtenditæ*

viz. the one in reſpect of the *Scutum*, which the Lord actually bore, and the other in Reſpect of the *Scutum*, which every ſuch Tenant ought to have bore to the Wars.

Suppoſing Eſcuage, as above, to have been a pecuniary Service, it is not likely, that *Knight-Service* was, as the Lord *Coke* imagines (o), incident to *Eſcuage*, or that *Eſcuage* was, as Mr. *Madox* ſuppoſes (p), incident to *Knight-Service*: *Eſcuage* being in this View a ſpecifick Service of a

ditiæ & Heribannus, appears from the Book of Feuds. *Lib.* 2. *Tit.* 40, 54, 55. *Schilt. Cod. Juris Alaman. Cap.* 8. 87. *Com. ad Cap.* 8. *Sect.* 16. *Stry. Examen. jur. Feud. Cap.* 18. *Q.* 26, 30. *Zaſius in uſus Feud. fol.* 41. *Lindenb. Cod. Leg. Antiq. Int. Leg. Longobard. Lib.* 1. *Tit.* 14. *Lib.* 3. *Tit.* 6. *& Gloſſ. adinde verbo Heribannus.*

Having obſerved thus much concerning the Word *Scutagium*, as it relates to *Tenure* only, it may not be improper to note farther (from Mr. *Madox*) that the Word *Scutagium* was likewiſe anciently uſed in a more extenſive Senſe, to ſignify any Payment aſſeſſed upon *Knights Fees*, whether ſuch Payment was for the King's Army or not; thus the *Aid* ariſing out of *Knights Fees*, for ranſoming King *Richard* I. is called *Scutagium ad Redemptionem Regis*, and other *Aids* ſet upon *Knights Fees* were alſo for ſome Time called *Scutagia. Vid. Mad. Hiſt. of the Exchеq.* 410. 431.

(o) 1 Inſ. 69. a.

(p) Hiſt. of the Excheq. 432. in Marg.

different

different Kind, in reſpect whereof the Tenant, on Account of its Subſerviency to the military Policy of the Nation, was only eſteemed as a *Knight*, or military Tenant: And it is no Objection to this Notion of *Eſcuage*, that *Littleton* hath not hinted it, becauſe it might in his Time be confounded and loſt in the more general Notion of Eſcuage, conſidered as a *Fine* or *Commutation* for Service, to which all Tenants by Knight-Service were liable, if they did not by themſelves, or by ſome other Perſon, diſcharge the Duties of their Tenure: for,

2. Though *Eſcuage*, conſidered as a *Species* of *Tenure*, might be of the Nature already ſuggeſted; yet it muſt be allowed, that it was anciently, as well as at this Day, more generally underſtood to denote a *Muict* or *Fine* for a military Tenant's Defect of Service (q), and that, though it was

(q) Vid. Mad. Hiſt. of the Exchеq. 438, 439, 454, 457, 458, 462.

not

not from the Time of King *John*, whatſoever it was before, arbitrary and at the Will of the Lord, but was to be fixed and aſſeſſed by Parliament (r). It was nevertheleſs aſſeſſed as a *Fine* or Satisfaction to be anſwered by ſuch Perſons only, as did not attend to the Duties of their Tenure (ſ): for though it is very certain, that

(r) *Roll. Tit. Eſcuage d'eſtre aſſeſſe per Parliament*, ſays that King *John*, *en un Charter ordain en ceſt manner*. 2 Ro. Ab. 509. S. 1. Vid. Infr. 133.

(ſ) And therefore if the Lord diſtrained his Tenant for Eſcuage, it was in *Littleton*'s Time a good Plea to ſay, that he was with the King in his Wars. *Lit. Sect.* 102.

There is a remarkable Paſſage in *Mat. Paris* (*fol.* 372.) importing that a Fine or Commutation, called by him *Auxilium*, was after the Charter of King *John* to be aſſeſſed *de jure*, for *Defect* of Service, and *not otherwiſe*. The whole Paſſage is worthy the Reader's Notice, and therefore I have tranſcribed it, *viz. Convenerant eo tempore*, (*Anno ſcil't* 1232. *Nonas Martii*) *ad Colloquium apud Weſtmonaſterium ad Vocationem Regis, Magnates Angliæ tam Laici quam Prælati, quibus Rex propoſuit quod magnis eſſet Debitis implicatus cauſa bellicæ Expeditionis, quam nuper egerat in partibus tranſmarinis, unde neceſſitate compulſus ab omni generaliter Auxilium poſtulavit: Quo audito Comes Ceſtriæ Ranulphus pro Magnatibus Regni loquens reſpondit, Quod Comites Barones ac Milites qui de eo tenebant in Capite cum ipſo erant ibi corporaliter præſentes, & pecuniam ſuam ita inaniter Effuderunt, quod inde Pauperes omnes recceſſerant, unde Regi de Jure Auxilium non debebant. Et ſic petita*

that all Tenants by *Knight-Service* were originally bound in all Events, either by themſelves, or by ſome other Perſon, actually to do the Services of their *Tenure*; yet, if ſuch Tenant did neither do them himſelf, nor provide another Perſon to do them, the Lord might accept a pecuniary Satisfaction, and chooſe whether he would take Advantage of the Forfeiture or not (t): but then the Te-

petita Licentia Laici omnes receſſerunt. Prælati vero Regi reſpondentes dixerunt, Quod Epiſcopi multi & Abbates, qui vocati erant, non fuerunt præſentes, & ſic petierunt Inducias quouſque ad Diem certum poſſent omnes pariter convenire: Præfixus eſt itaque Dies a Quindecim diebus poſt Paſcha, ut omnibus congregatis, tunc fieret quod erat de Jure faciendum.

(t) That Non-performance of the feudal Duties was a Forfeiture of a Feud appears above, *p.* 43. and that it was likewiſe anciently a Forfeiture of Tenure appears from the Leiger-Book of *Abingdon* cited by Mr. *Selden* in his Notes upon *Hengham*, *p.* 114, 115. *viz. Eſt juxta Abendune Burgum unius Militis Manſio quæ Lea vocatur: Hanc Willielmus Regis Camerarius de Londonia tenebat.* This *William* held it of the *Abbey*, and by *Knight-Service:* In 2 *Hen.* I. Forces were levied to encounter *Robert* Duke of *Normandy*, when *Faritius* Abbot of *Abingdon* required of *William* his Tenant to find him a Man for the Army, as his Tenure bound him to do, but *William* denied it, whereby the Abbot was driven by other Means to ſupply the Number of his Part.

Tenant was at the Mercy of the Lord, and ſuch Satisfaction was to be made, as the Lord thought ſufficient: But as the feudal Severities abated, and Lords grew indifferent, whether they were ſerved by their own Tenants, or by others, ſuch Forfeitures were eaſily diſpenſed with; and pecuniary Compenſations, ſuch poſſibly as might barely enable the Lords to hire others to do the Services of their *Tenures*, were commonly accepted; inſomuch that, as ſuch Compenſations became frequent, and at length uſual, moſt Tenants grew careleſs of their Services, and choſe rather by theſe Means to ſatisfy their Lords, than to do their Services in Perſon, or be at the Trouble to provide another to do them: Our Kings anci-

The Abbot afterwards *tamdiu* (as the Book ſaith) *in Præſentia Sapientum hanc rem ventilari fecit, ut Ille neutrum negaret, imo fateri ſic eſſe vera ratione cogeretur. Unde cum Lege patriæ decretum proceſſiſſet ipſum exortem terræ merito debere fieri, Interpellatione bonorum qui intererant Virorum reddidit terram illam illi.* And ſo the Tenant (ſays Mr. *Selden)* under fair Conditions had his Land again.

ently

ently (u) taking Advantage of, or perhaps complying with, this Humour of their Tenants, which had made their actual Service doubtful and precarious, did ſometimes upon Occaſions of War, without Summons or other Ceremony, aſſeſs a moderate Sum upon each *Knight's Fee*, as a *Scutage* or *Eſcuage*, by means whereof they might be enabled in all Events to provide Soldiers or Stipendiaries, to do the Services of their Tenants (w), who as Equivalents had prevailed, could not be ſecurely depended upon: But as *Eſcuage* of this Sort was a *previous* Commutation or Equivalent for Service, really *impoſed* at the King's Will, and not

(u) *Henry* II. is thought to have taken the firſt Scutage. *Mad. Hiſt. of the Exchеq.* 435. *Spelm. Gloſſ. ad verbum Scutagium.*

(w) *Fit interdum ut imminente vel Inſurgente in regnum hoſtium machinatione decernat Rex de ſingulis feodis Militum ſummam aliquam ſolvi, Marcam (ſcil't) vel Libram unam, unde Militibus ſtipendia vel Donativa ſuccedant. Mavult enim Princeps ſtipendiarios quam Domeſticos bellicis apponere caſibus. Hæc itaque ſumma, quia nomine Scutorum Solvitur, Scutagium nuncupatur.* Gervaſ. de Tilb. de Scacc. apud Mad. fol. 25.

incurred as a Fine or Compenſation by any Default or Neglect of the Tenant, it was not long ſubmitted to: for, though the King, poſſibly until the Charter of King *John*, might have a Right to fix the *Fines*, which *particular* Tenants voluntarily incurred or compounded for; yet it was not reaſonable that he ſhould at his Pleaſure demand a *general* Commutation, that his Tenants ſhould in all Events ſubmit to: But on the contrary, if he would rather have a general *Eſcuage* or Commutation, than the perſonal Service of his Tenants, it was highly reaſonable, that his Tenants ſhould agree to it, and in *Parliament* aſſeſs the Sum, that it might not exceed the Value of their Service, or the occaſion of the Demand: This was thought ſo reaſonable, that, in the Time of King *John*, it was not only inſiſted upon as an undoubted Right of the King's Tenants; but, becauſe every *Scutage* or *Eſcuage*, even for parti-

cular defects of Service did, in his Time, concern ſo great a number of the ſubjects of the realm, the *Barons* urged, and the King by his Charter declared, that no *Eſcuage* ſhould be impoſed or aſſeſſed, *niſi per commune Concilium regni* (x). This or a like Declaration, as to the manner of impoſing or aſſeſſing *Eſcuage*, is not to be found in the Charter of his ſucceſſor *Henry* III, but ſtill it operated as a Declaration of the common Law (y), conſiſtent with the Charter of *Henry* III, which declares, that *Eſcuage* ſhould from thenceforth be taken, as it had been uſually taken in the time of *Henry* II. (z)

(x) *Nullum Scutagium—ponatur in regno noſtro niſi per commune Concilium regni noſtri.* Carta Reg. Johannis.

(y) Albeit *Eſcuage incertain* be due by *Tenure*, yet becauſe the Aſſeſſment thereof concerned ſo many, and ſo great a Number of the Subjects of the Realm, it could not be aſſeſſed by the King, or by any other, but by the Parliament; and this was (ſays the Lord *Coke*) by the Common Law, 1 *Inſ.* 72. *a.* but *Littleton*, who never went beyond himſelf, ſpeaks more doubtfully of the Matter. *Lit. Sect.* 97.

(z) *Scutagium de cætero capiatur ſicut capi tempore Regis Henrici avi noſtri conſuevit.* Mag. Carta Hen. III. c. 37.

Eſcuage being now the only Penalty for defect of Service, many Lords by Agreement between them and their Tenants fixed this uncertain *Eſcuage* to a certain Sum, that ſhould be paid, as often as *Eſcuage* ſhould be granted, without Regard to the Rate that ſhould be fixed or aſſeſſed by Parliament: *Eſcuage* thus aſcertained was called *Eſcuage certain*, and becauſe it did in Effect diſcharge the Tenant from all military Service, the Perſons, who held by ſuch *Eſcuage*, were looked upon as *Socage* Tenants, and were no longer eſteemed as Tenants by *Knight Service* (a).

(a) Lit. Sect. 98, 120. 1 Inſ. 87. a.

CHAP. III.

HAVING thus imperfectly ſet forth the Nature of FEUDS, and ſhewn how *Tenures*, and the Conſequents of *Tenure* were probably eſtabliſhed in *England*; I ſhall now endeavour to ſhew, that, though our Doctrine of *Tenures* may not exactly tally with any particular Syſtem of FEUDS, they are nevertheleſs of a feudal Nature, as well as Original: for though there may be many Particularities in our Law of *Tenures*, that can hardly be accounted for upon ſtrict Feudal Principles; yet they will in no Degree affect the Truth of this Propoſition, if it be conſidered, that the Feudal Policy did not at once prevail in the ſeveral Parts of *Europe*, by a conquering power, or in a legiſlative uniform Manner, but that it obtaining as a mere Policy, and as ſuch, gradually ſpreading itſelf over

the Weſtern Parts of the World (a), was variouſly received, every Nation ſo modelling it, as to preſerve its principal Aim, and at the ſame Time to make it conform as far as poſſible with the Notions of Government and Conditions of Property entertained and eſtabliſhed in each Country (b), antecedent to its Reception of ſuch Policy.

To come therefore to the Buſineſs of this Chapter, it is to be obſerved, that it is ſo abſolute a Maxim, Principle, or Fiction of the Law of *Tenures*, that all the Lands in *England* are holden either mediately or immediately

(a) *Jus hoc feudorum non ſimul nec uno Tempore Gentibus Europeis illuxit, ſed his ſerius, illis citius, ſenſimque adolevit, & radices undiquaque cœpit agere.* Crag. de Jur. feud. 29.

Quæ (feuda ſcil't) ab iiſdem Longobardis jam olim Moribus erant recepta, eadem apud pleraſque Gentes alias ita invaluere ut partem apud ſingulas Juris civilis faciant. Grot. Prol. Hiſt. Goth. 64.

(b) *Jus feudale eſt locale, ejuſque partes ut quæq; ſibi commodior videbatur, Gentes Europeæ ad ſe traduxerunt & Obſervationibus diverſis quaſi Emollierunt.* Crag. de Jur. feud. 217. *Dubium non eſt Gentes diverſas recipiendo pedetentim ſeuda, Jura quoque ſpecialia ſibi circa eadem Conſtituiſſe.* Stryk. Exam. Jur. Feud. Cap. 1. Q. 5.

of

of the King (c), that even the King himſelf cannot give Lands in ſo abſolute and unconditional Manner, as to ſet them free from *Tenure:* And therefore, if the King ſhould grant Lands without reſerving any particular *Service* or *Tenure*, or if he ſhould in expreſs Words declare, that his Patentee ſhould have ſuch and ſuch Lands *abſque aliquo inde reddendo*; yet the Law or eſtabliſhed Policy of the Kingdom would create a *Tenure*, and his Patentee ſhould anciently (before the Stat. 12 *Car.* 2. *Cap.* 24.) have held of him in *Capite* by *Knight-Service* (d): for as a *Tenure* was neceſſary, and the *Tenure* in ſuch Caſe

(c) Thus according to the Lord *Coke*, all the Lands and Tenements in *England* in the Hands of Subjects are holden mediately or immediately of the King: For in the Law of *England* we have not properly *Alodium*, that is, any Subject's Land that is not holden. 1 *Inſ.* 1, 65. 2 *Inſ.* 501. *Somn. Treat. of Gav.* 126.

(d) Of ſuch Neceſſity is the Reſervation of a Tenure ——that altho' the King ſhould grant Land without any Reſervation of Tenure, or by expreſs Words *abſque aliquo inde reddendo*, yet the Law would create a Tenure in *Capite* (Caſe of Tenures upon the *Iriſh* Com. of defective Tit. 196.) by Knight-Service. 6 *Rep.* 6. 9 *Rep.* 123. *Vid. Bro. Tit. Tenures*, 3, 52.

uncertain,

uncertain, the Law created ſuch a *Tenure* as was moſt agreeable to the Policy and Deſign of *Tenure*, and ſuch as came neareſt to the Nature of a *proper* FEUD, upon the Feudal Preſumption, that every FEUD was a *proper* FEUD (e), that did not appear *ex verbis inveſtituræ* to be otherwiſe (f): beſides, a *Tenure* of ſome ſort or other is ſo neceſſary, that it cannot be releaſed: and therefore if the King releaſe the Services to his Tenant, it will not extinguiſh the *Tenure*; but the Tenant ſhall notwithſtanding hold by *Fealty*, which is (ſays the Lord *Coke)*, an incident inſeparable, *(i. e.* eſſential) to every *Tenure* (g), and which cannot therefore be releaſed (h).

(e) Vid. ſup. p. 36.

(f) Thus in *Scotland* all Lands are preſumed to hold *Ward*, except another *Holding* be expreſſed, *& ſervitium debitum & Conſuetum* is interpreted to be *Ward-holding*, which is the propereſt Holding, and in the *Scotch* Diviſion of *Holding* anſwers to our Tenure by *Knight-Service.* Vid. *Sir Geo. Mackenzie's Inſ.* 107, 108.

(g) 9 Rep. 123. Caſe of Tenures, &c. 196.

(h) *Fidelitas remitti non poteſt.* Zaſius in uſus Feud. 122. Vid. ſup. p. 35.

This

This Fundamental Principle, that all the Lands in *England* are holden, is ſingly a Proof, that our Lands thus held are either FEUDS, or of a Nature very like them; ſince (as Mr. *Selden* ſays) *veluti Beneficia ſeu Feuda clientelam alicujus Domini merito ac planiſſime aut Agnoſcant aut Agnoſcere debeant* (i).

Lands thus held we call *Tenures* (k), which are principally and generally divided according to their Services, (whether Military or Predial, certain or uncertain) into *Tenures* by *Knight-Service*, and in *Socage*.

I. *Tenures* by *Knight-Service* differed very little from *proper* FEUDS; for they were purely Military, and genuine Effects of the Feudal Eſtabliſhment in *England*. The Services were occaſional, tho' not altogether uncertain, as in *proper* FEUDS (l); they be-

(i) Seld. Notes ad Eadmer. 203.

(k) *Tenure eſt la maniere par quoy les tenenents ſont tenus des Seigneurs.* Cuſtum. de Norm. Cap. 28. fol. 47. b.

(l) Vid. ſup. p. 28.

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ing with us reſtrained, as in *Normandy*, to 40 Days (m). But the *Tenure* itſelf was in moſt other Reſpects to be conſidered as a *proper* FEUD: for it was created by pure Words of Donation (n), was transferred by *Livery* or *Inveſtiture*, and perfected by *Homage* or *Fealty* (o): It was ſubject to *Relief*, *Aid*, and *Eſcheat*, to *Wardſhip* and *Marriage*, and to almoſt all the Conditions and Reſtrictions of a pure *Original* FEUD.

Theſe *Tenures* by *Knight-Service* are now aboliſhed by the Stat. 12 *Car.* 2. *Cap.* 24. and turned into *common Socage*; ſo that I ſhall not diſtinctly conſider the ſeveral Properties, Kinds and Diverſities of *Tenure* treat-

(m) Vid. Conſuetud. Norman. Tit. de Exercitu Ducis. Cap. 25. & Lit. Sect. 95.

(n) Vid. 1 Inſ. 9. a.

(o) Whatſoever Difference there was anciently in our Law between Homage and Fealty, *(Vid. Sup. p.* 55, 67. *in Marg.)* they are now ſo blended together, that they are in Effect with us, as in other Countries, but one and the ſame Engagement. *Vid. Le Stat. de Homagio* 17 *Edw.* II. *Lit. Sect.* 85. *Crag. de jure Feud.* 222. *Cuſtum. de Norm. Cap.* 29. *fol.* 48. *b. Bacon Hiſt. of Eng. Gov.* 200, 201.

ed

ed of by our *Engliſh* Lawyers under this Head, but ſhall barely inquire, how far our *Tenures* in *Socage* may be ſuppoſed, even at this Day, to retain the Nature of FEUDS.

II. *Tenures* in *Socage* (p) are *Holdings* by any certain conventional Services, that are not Military (q), the Word *Socage* being according to Mr. *Somner* (r), derived of the *Saxon* Word Soc, which imported a Liberty, Privilege or Immunity, and AGIUM, which was, according to the Lord *Coke* (ſ), a legal Termination importing Service or Duty.

The Privilege or Immunity (ſays Mr. *Somner)* imported by Soc conſiſted in a Freedom from all military and uncertain Services, whereunto AGIUM being added, which

(p) *Socage* (ſays Mr. *Somner)* is a Term as old as *Domeſday-Book*, tho' it firſt occurs in *Glanvil*, and be not uſed in any elder Record. *Treat. of Gav.* 143.

(q) *Tenure en Soccage eſt lou le tenant tient de ſon Seignior ſon Tenement per certain Service pur touts maners de ſervices iſſintque les Services ne ſont pas Services de Chivalry.* Lit. Sect. 117.

(r) Treat. of Gav. 133, 141.

(ſ) 1 Inſt. 86. a.

ſignified

ſignified the *Agenda*, the Service or Duty to be returned for that Privilege, it comes forth *Socagium* in *Latin*, *Socage* in *Engliſh*; and he thinks that this Term cannot, according to the Opinion of our common Lawyers, (t) be derived from the Word Soca, and ſo be underſtood to import Servitium Socæ, that Senſe being (as he ſays) too narrow to take in all the Services of the ſeveral Eſtates, that are held by *Socage Tenure:* But as *Littleton* (u) obviates this Objection by declaring that this *Tenure*, which had its Denomination from its moſt ancient and uſual Service, may well retain the ſame Name, notwithſtanding the Service of the Plough be now changed into many other Kinds of Service; I muſt confeſs, that, tho' the Conjecture of Mr. *Somner* be very Ingenious, and though *Britton*'s Deſcription of *Socage Te-*

(t) Vid. Litt. Sect. 119. Fleta L. 3. Cap. 16. Sect. 3.
(u) Sect. 119. Vid. 1 Inſ. 86. b. Crag. de Jur. Feud. 65.

nure

nure (w) ſeems to countenance it; yet I am inclined to prefer the general Opinion of our common Lawyers, 1. Becauſe our Diviſion of *Tenures* into *Knight-Service* and *Socage*, conſidering *Socage* as a *Tenure per Servitium Socæ*, directly anſwers the *Norman* Diviſion of *Tenures* into *Fiefs de Haubert* (x) and *Fiefs de Roturiere*, that is

(w) *Sokemanries ſount Terres & Tenements, que nè ſount mye tenus par Fee de Chivaller ne par graunds Serjaunties, ne par petits, mes par ſimples Services, ſicome Terres Enfranches par nous ou par nos predeceſſours d'nos aunciennes Demeynes.* Brit. cap. 66. Sect. 438.

(x) Hence a Tenant by Knight-Service is deſcribed in the old Cuſtomer of *Kent*, as one *qui tiene per fee de Hawberke.* Lamb. Peramb. of Kent, 646.

Mr. *Loyſeau* gives a very rational Account of the Denomination of this *Fief*, which, becauſe it ſhews in ſome Meaſure the Analogy between this and our *Engliſh* Knight's Fee, I ſhall give the Reader in his own Words, *viz. Les Seigneurs des Baronnies—ſe ſont appellez Hauts Barons, ou hauts Bers; car il eſt bien certain que —— Ber & Baron eſt meſme choſe —— Et Hautber & Hautbaron ſont confondus comme Synonimes, & de la ſans doute Originairement a eſtre dit le fief de Hautbert —— Mais pour ce que le Haut Ber ou Seigneur de fief de Hautbert eſtoit tenu ſervir le Roy en guerre avec Armes pleins —— & conſequemment avec l'arme du Corps, qui eſtoit lors la cotte de Mailles, de la eſt venu que ceſt arme a eſte appellee Hauber ou Haubergeon, dont a ſucceſſion de temps eſt advenu, que le fief de Hauber a eſte pris pour toute eſpece de fief, dont le Seigneur eſt tenu ſervir le Roy avec le Hauber ou Haubergeon.* Loyſeau Traite des Seigneuries 156, 157. Vid. Seld. Notes on his Jan. 119.

according

according to Mr. *Somner*'s own Tranſlation, the *Gentleman*'s and the *Huſbandman*'s, or *Ploughman*'s Fee (y); and 2. Becauſe in this Senſe the *Tenure* in *Socage* is like the *Tenure* by *Knight-Service*, the other Branch of Tenures, ſimply denominated from the Name or Nature of the Service, anciently reſerved upon ſuch *Tenure*.

But be this as it will, all our *Engliſh Fees* or *Holdings*, whether they be *Frank* or *Emphiteuticary*, *Burgage* or *Gavelkind*, (though *Burgage* and *Gavelkind* have many Qualities different from *Common Socage*) do now fall under the Notion of *Socage Tenures*, which, though they vary in Point of Service, Succeſſion, and the like, as improper FEUDS (z), do nevertheleſs retain the Nature of FEUDS: Inaſmuch as they are held of ſome

(y) Somn. Treat. of Gav. 36, 49, 50. Vid. Lamb. Peramb. of Kent, 604.
(z) Vid. ſup. p. 32.

Lord

Lord or Superior by *Fealty* (a), and uſually by ſome other certain Service or Acknowledgment; and inaſmuch as they yield or pay Relief (b), and may eſcheat.

(a) *Fealty* was as neceſſarily incident to every *Tenure*, as to every *Feud*, (*Vid. Sup. p.* 35.) and therefore if the King granted Lands *tenend' per Servitium unius roſæ ſolummodo pro omnibus & omnimodis aliis Servitiis*; yet *Fealty*, the Politick *Bond of Tenure*, tho' looked upon as a Service, ſhould be ſuppoſed contrary to ſuch Grant; (6 *Rep.* 6, 7.) for *Fealty* could not with us, more than by the Law of Feuds, be diſcharged or diſpenſed with, becauſe it was the *Vinculum Commune*, or Cement of the whole feudal Policy; and, though it was ſworn to the Lord, virtually extended to the whole Community; the Lord therefore was to ſee that his Feudatary did his *Fealty*, that is to ſay, that he contributed, according to his *Fealty*, or feudal Engagement, to the Maintenance and the Security of the Society, formed and united together by a Military or Feudal Policy. And this was anciently one of the main Articles of Inquiry in the *Lord's Court*, called at this Day a *Court-Baron*; in which the Lord was wont, not only to receive the *Fealty* of his Tenants, but to inquire of, and inforce the Obſervance of it; not meerly as it reſpected his particular Intereſt, but as it tended to the Defence and Security of the Public. (*Vid. LL. Will.* I. *Cap.* 59.) And the Lord in Conſequence of ſuch *Fealty* done to him, and of the Power he had, and the Obligation he was under to inforce it, ſeems to have been anciently accountable to the Public for the Behaviour of his Tenant, (*Vid. Leg. Hen.* I. *Cap.* 8, 41.) until it was expreſly declared by the 86th Law of *Henry* I. that he ſhould not be accountable for the Miſbehaviour of his Man or Tenant; *Si Homo ſuus misfaciat ſine poſſe vel velle ſuo, maxime ſi nunquam deinceps ad eum redeat.*

(b) Vid. Sup. p. 104. & ibid. in Marg.

Our Lawyers divide theſe Tenures, according to their Duration, or what they call the Quantity of Eſtate, into Eſtates in *Fee*, for *Life*, for *Years*, and at *Will*; but I ſhall divide them into Eſtates in *Fee* and for *Life* only, this Diviſion being large enough for my Purpoſe.

I. Eſtates in *Fee* are either *Fees Simple*, or *Fees Tail*. A *Fee Simple*, tho' it be according to *Littleton*, *Hæreditas pura* (c), yet is not ſo called, becauſe it imports an Eſtate purely *Alodial*, or free from all *Tenure*; but is ſo called in Oppoſition to *Fees Conditional* at Common Law, and *Fees Tail* ſince the Statute *Weſtm.* 2. *de Donis*; as importing a ſimple Inheritance clear of any Condition, Limitation, or Reſtriction (d) to any particular Heirs, and deſcendible to

(c) Lit. Sect. 1.

(d) Thus according to the Lord *Coke* (1 *Inſ.* 1. *b.*) the Word *Simple* properly excludeth both Conditions and Limitations, that defeat or abridge the Fee. And according to *Fleta*, *Simplex Donatio & pura eſt, ubi nulla adjecta eſt Conditio neque Modus.* Fleta Lib. 3. Cap. 8.

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the Heirs General, whether Male or Female, Lineal or Collateral: for it having been for many Ages a fixed and undeniable Principle or Fiction of the Law of *Tenures*, that all the Lands in *England* are holden, our *Engliſh* Lawyers very rarely (of late Years eſpecially) uſe the Word *Fee* in Contradiſtinction to *Alodium*, to denote the *Tenure* and Quality of any Man's Eſtate; but generally uſe it *ſimply* to expreſs the Continuance or Quantity of Eſtate: and this is clearly the Senſe and Import of it in the Form of Pleading an Inheritance in the King, *viz. Rex ſeiſitus fuit in Dominico ſuo ut de Feodo*, where the Word *Feodum* cannot poſſibly import *a Tenure* (e); Nor can it (as Sir *Henry Spelman* ſuppoſes (f), contrary to the original and proper Senſe of the

(e) For the King cannot be ſaid to be a Tenant, becauſe a Tenant holdeth of ſome Superior, and the King hath no Superior but God. 1 *Inſ.* 1. *b. Caſe of Tenures*, 193, 194.

(f) Treat. of Feuds, fol. 6.

Word) import *Directum Dominium:* but muſt be underſtood, without Regard to the *Dominium*, *Propriety* or *Tenure*, ſimply to denote an Inheritance (g).

Sir *Thomas Smith* (h), *Cowel* (i), and others therefore miſapprehending the Senſe, in which *Littleton* ſays, that *Feodum eſt Idem quod Hæreditas Legitima & pura*, charge him with a new and abſurd Notion of a *Fee*; whereas if he be rightly underſtood, it is plain that he doth not uſe the Word *Fee* in an improper or barbarous, but in a partial Senſe only: for ſince thoſe *Dona* or *Beneficia*, which we now call *Feoda*, were not ſo called, 'till they became Hereditary (k), the Word *Feodum*, as a Term, imports not only *Beneficium*,

(g) Fee, in our legal Underſtanding (ſaith the Lord *Coke*, 1 *Inſ.* 1. *b.*) ſignifieth, that the Land belongs to us, and our Heirs, in reſpect whereof the Owner is ſaid to be *ſeiſed* in *Fee*, and in this Senſe the *King* is ſaid to be *ſeiſed* in *Fee*.

(h) Smith de Rep. Ang. 283, 284.

(i) Cowel Int. ad Verbum Fee.

(k) Vid. Sup. p. 19.

but

but *Beneficium & Hæreditatem* (l), and is ſo to be underſtood in the *Formula* of Pleading a Subject's Title to an Inheritance *in Dominico ſuo ut de Feodo*, where the Word *Feodum* imports as well *Beneficium* as *Hæreditatem*: So that though, when FEUDS were fully eſtabliſhed, and there remained no *Alodial* Property in *England*, *Littleton* uſed the Word *Fee* in a partial Senſe only to denote the Quantity of Eſtate, and not the Quality or Conditions of Tenure; yet it is not to be imagined that he did it ignorantly; unleſs we can ſuppoſe that he knew nothing of the Ground of *Tenures*, or of thoſe Authors who had gone before him, and had expreſly noted, that *Feodum* did likewiſe

(l) *Aliqui Feudum duplici ratione acceptum produnt, alia ſcil't, qua quis tenet immobile aliquid ex quacunque cauſa ſibi & Hæredibus ſuis, alia, qua quis tenet ab alio per Redditum vel ſervitium vel utrumque.* Cow. Inſ. L. 2. Tit. 2. Sect. 8.

import Lands holden of another by Service (m).

In conveying or conferring theſe *Fees* or Eſtates in Fee, though they are now, contrary to the Original Purity of *proper* FEUDS, become vendible, the ancient Form of Donation is ſtill preſerved; and a *Feoffment*, whether conſtituting or transferring a *Fief* or *Fee*, retains even at this Day the Form of a Gift (n): It is perfected and notified by the ſame Solemnity of Livery and Seiſin, or Inveſtiture, as a pure feudal Donation (o),

(m) Thus *Bracton*, who wrote long before *Littleton*, ſays, that *Feodum eſt id quod quis tenet ex quacunque cauſa ſibi & hæredibus ſuis* —— *Item dicitur Feodum alio modo ejus qui alium feoffat, & Quod quis tenet ab alio, ut ſi ſit qui dicat talis tenet de me tot Feoda per Servitium militare.* Bract. Lib. 4. fol. 236. b.——Fleta (Lib. 5. Cap. 5. Sect. 27.) gives us, in *Bracton*'s Words, the ſame double Senſe of the Word *Feodum*, which is expreſly agreed by the Lord *Coke*. 1 *Inſ.* 1. *b.* 4 *Inſ.* 202. and was well underſtood by *Littleton*, as appears from his frequent Mention of Knight's Fees, *i. e.* of Fees holden by Knight Service. *Vid. Lit. Sect.* 95, 102, 112, 113, *&c.*

(n) For *DO* is the apteſt Word of Feoffment. 1 *Inſ.* 9. *a.* whence a Feoffment is called *Donatio. Ibid. & Fleta, Lib.* 3. *Cap.* 8.

(o) Vid. Fleta Lib. 3. Cap. 15. Sect. 4, 5. Bract. Lib. 2. Cap. 17. Sect. 1.

and

and is ſtill directed and governed by the ſame Rules; inſomuch that the Principal Rule, relating to the Extent and Effect of a feudal Donation, *Tenor eſt Obſervandus* (p), is in other Words become a Maxim of our Law relating to Feoffments, *Modus Legem dat Donationi.* In Feoffments too, as in pure feudal Donations, the Giver or Superior, from whom the *Fief* or *Fee* moves, muſt expreſly limit and declare the Continuance or Quantity of the Eſtate he means to confer, or elſe the Feoffee or Donee ſhall have an Eſtate for Life only (q); for Feoffments are ſtill ſo far to be conſidered as Gifts, that they are not to be extended beyond the expreſs Limitation or manifeſt Intention of the Feoffor (r); and therefore as the *Perſonal* Abilities and Services of the

(p) Vid. Sup. p. 21.

(q) 1 Inſ. 42. a. Crag. de jure feud. 53.

(r) *Feodum ex ſua Natura eſt ſpecies quædam Donationis, & æquum eſt ut omnes Donationes ſint ſtricti juris, ne Quis plus donaſſe præſumatur quam in Donatione expreſſerit.* Crag. de jur. feud. 50. Vid. Sup. p. 16, 17.

Feoffee were originally ſuppoſed to be the immediate or principal Inducements to the Feoffment, the Feoffee's Eſtate in the *Fee* ſhould ſubſiſt no longer than his Life; unleſs the Feoffor, by an expreſs Proviſion in the Creation or Conſtitution of the *Fee*, gave it a longer Continuance.

Feoffments had likewiſe anciently, (that is to ſay) before the Statute *Quia Emptores Terrarum*, almoſt all the Conſequences of pure feudal Donations: for they, without any Words of Reſervation, created a Tenure between the Feoffor and the Feoffee, and the Feoffor was, in Conſequence of his own Gift (ſ), on Account of the Services he received, or was ſuppos'd to receive from his Feoffee, bound to warrant (t), and defend his Seiſin or Poſſeſſion; and if he could not maintain it, was obliged to make him Satisfac-

(ſ) Vid. Statut. de Bigamis, 4 Edw. I. Cap. 6. 1 Inſt. 384. a. 4 Rep. 81.

(t) *Warrantizare nihil aliud eſt quam Poſſidentem defendere.* Fleta Lib. 5. Cap. 15. Bract. Lib. 3. Cap. 16. Sect. 10.

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tion by rendering to the Value of the Fee, if it was evicted (u).

Although this might ſuffice to convince the Reader that our preſent *Tenures* are altogether Feudal, yet I ſhall conſider ſome of the moſt ancient Qualities of *Tenure*, as that our Eſtates were not alienable, teſtamentary, and the like, and ſhall ſubmit them as farther Evidences of the feudal Nature of *Tenure*.

1. It is very certain that our *Fees* or Eſtates could not at Common Law be aliened without the Licence and Conſent of the Lord (w), and that

(u) Vid. Sup. p. 38, 39. Glanv. Lib. 9. Cap. 4.

(w) Vid. Spelm. Treat. of Feuds. 21. Somn. Treat. of Gav. 8, 9. Bacon Hiſt. of the Eng. Gov. 274.

The true Reaſon is given by *Plowden* (*Arguendo Mo.* 172.) *viz. Quia les Conſidences del Tenure (ceſt) le Homage, Fealty, Service, &c. fueront mutualment appropriate al Perſon del Roy & le Tenant per le Original done, iſſintque il ne puiſſoit eſtoyer ove reaſon de eux transferrer ou ſeverer ſans gree, &c.*

It is ſaid indeed *Bro. Tit. Alienation* 10. that a Tenant holding even of the King *poet alyener devant An.* 20 *H.* III. *cy frankment ſans lycence que auter Home poet* ——— But whether this Opinion be not grounded upon a miſtaken Senſe of *Magna Charta Cap.* 32. is left to the Reader, upon what is ſuggeſted in the Text concerning that Statute. *Inf.* 157, 158.

that this Reſtraint of Alienation was a feudal Quality of *Tenure* is hardly to be doubted (x), ſince it is not otherwiſe to be accounted for (y): But though Tenants in general could not *de jure* alien or transfer the *Tenure* itſelf, yet the Tenants of Common Lords might give *Part* of their Lands (z) to hold of themſelves,

The Lord *Coke* (1 *Inſ.* 43. 2 *Inſ.* 65, 66, 501.) ſuppoſes, that tho' a Tenant could not at Common Law alien a *Part* to hold of the Lord, becauſe the Lord's Seigniory was intire, yet the Tenant might have made a Feoffment of the *Whole* to hold of the Lord, becauſe there no Prejudice enſued, *&c.* but this ſuppoſition is ſo contrary to the feudal Notions of Alienation, (*Sup. p.* 29.) and ſo inconſiſtent with any reaſonable Conſtruction of the Statute *Quia Emptores Terrarum*, that it is not to be credited. *Vid. Glanvil Lib.* 17. *Cap.* 1. *Bacon Hiſt.* of *Eng. Gov.* 374.

(x) Vid. Sup. p. 29, 30.

(y) Eſpecially if we may ſuppoſe the *Saxon Bocland* and *Thaneland* to have been alienable, as we are aſſured by Mr. *Somner* they were. *Vid. Somn. Treat. Gav.* 87, 88, 89. *Spel. Treat. of Feuds* 21.

(z) *Poteſt quilibet Liber Homo terram habens Quandam partem terræ ſuæ cum filia ſua, vel cum alia qualibet muliere*, dare *in Maritagium*——*Quilibet etiam cuicunque voluerit poteſt* dare *quandam partem ſui liberi tenementi in remunerationem ſervitii ſui, vel Loco religioſo in Eleemoſynam*—— *Licet autem ita generaliter cuilibet de terra ſua* rationabilem partem *pro ſua voluntate cuicunque voluerit libere in vita ſua* donare, *&c.* Glanv. Lib. 7. Cap. 1. But in all theſe Caſes the Donee held

ſelves (a), and did in Fact often diſpoſe of the whole (b), by which,

held of the Donor. *Tenentur autem Hæredes Donatorum* Donationes *& res Donatas ſicut rationabiliter factæ ſunt, illis quibus factæ ſunt & hæredibus ſuis Warrantizare.* Glanv. Lib. 7. Cap. 2.

(a) This Diſtinction between *Alienation* to hold of the next or ſuperior Lord, and *a Gift* or *Feoffment* to hold of the Tenant himſelf, anſwers the feudal Diſtinction between *Alienation* and *Subinfeudation:* For though *Subinfeudation* (by which a new inferior Feud was carved out of the old, the old one ſtill ſubſiſting) was allowed by the feudal Law; yet *Alienation* (by which the original Feud itſelf was transferred, and a new Feudatary ſubſtituted in the Place of the old) was not. (*Vid. Feud. Lib.* 2. *Tit.* 3. 26. *Sect.* 5. *Tit.* 34. *Sect.* 2, 3. *Tit.* 108. *Crag. de jur. Feud.* 343. *Schilt. Com. ad Cod. jur. Aleman. Cap.* 30. *Stry. Exam. jur. Feud. Cap.* 19. *Queſt.* 23, 24. *Zouch Deſcrip. jur. temp.* 11, 12. *Seld. Tit. of Hon.* 572.) The Alienation therefore here ſaid to be unlawful muſt be underſtood of Alienation to hold of the ſuperior Lord, as it is oppoſed to Subinfeudation, *i. e.* a Feoffment by the Tenant to hold of himſelf.

(b) That a Tenant might, in *Henry* II.'s Time, under ſome Circumſtances, have *given the whole Land*, appears from *Glanvil*, (Lib. 7. Cap. 1. p. 46. a.) *viz. Si* (is ſcil't qui terram ſuam donare voluerit) *nullum Hæredem filium vel filiam ex corpore ſuo procreaverit, poterat ex quæſtu ſuo cuicunque voluerit quandam partem* donare *ſive totum quæſtum (in vita ſua) hæreditabiliter* ——— *Sin autem & Hæreditatem & Quæſtum habuerit, tunc indiſtincte verum eſt quod poterit de quæſtu ſuo quantamlibet partem ſive totum cuicunque volueret* donare *ad remanentiam, de hæreditate vero ſua nihilominus dare poteſt, ſecundum quod prædictum eſt, dum ſcil't rationabiliter hoc fecerit.*

Emptiones vel Deinceps Acquiſitiones ſuas det, *cui magis velit. Si Bocland habeat quam ei Parentes ſui dederunt, non mittat eam extra Cognationem ſuam.* LL. H. I. Cap. 70.

though

though they could not force a new Tenant upon the Lord (c), yet they put him to ſome Inconveniences (d). This Practice (e) therefore was reſtrained by *Magna Charta, Cap.* 32. *Nullus Liber Homo* det (f) *de cætero am-*

(c) Vid. Bacon Hiſt. of the Eng. Gov. 274.

(d) As Loſs of *Wardſhip*, *Marriage*, *Eſcheat*, and the like. *See the Preamble to the Stat.* Quia Emp. Terr. 18 *Edw.* I.

(e) That this was the Practice reſtrained by this Law appears from *Stanford*, who ſays that this Statute is but a Confirmation of the Common Law, as it doth appear by that (ſays he) that is written in *Glanvil*, (*Sup. p.* 155. m. 156. m.) for ſo one that held by *Knight-Service*, if he might have been ſuffered to alien the greateſt Part of his Land, he would have aliened the ſame peradventure to hold of him but in *Socage*, or by ſome ſmall Rent, and then having ſo little a Livelihood left to himſelf, how had he been then able to have done the Service of a Knight, or a Man of War? or what ſhould his Lord have had in Ward to have found one to have done the Service? Surely little or nothing, whereby the Strength of the Realm might have much decayed: Therefore it was a reaſonable Law to reſtrain him, as me ſeemeth, *&c.* *Stanf. de Prærog. Regis* 28. *a.*

The Author of the Mirror, I confeſs, takes the Reſtraint of this Law in another Senſe, ſaying, that *Le Point de la grand Charter que defend que nul alien ſa terre en prejudice del Seignior del fief eſt enterpretable en ceſt manner; Que nul tenant ne alien le fiew ſon Seignior ſans ſon aſſent, ou a tenir en chief de Scignior ſans encreaſe del novel ſervice.* Mir. Cap. 5. Sect. 2. p. 316.

(f) The Word *DO*, as uſed in this Charter, in *Glanvil*, (*ut ſup. p.* 155. m.) and, in all Feoffments between common Perſons, was plainly, before the Stat. *Quia Emptores Ter-*

amplius alicui quam ut de reſiduo terræ *poſſit ſufficienter fieri Domino* Feodi ſervitium *ei debitum* (g). The Words *de cætero* do not (as I take it) ſuppoſe that the Tenant might before have lawfully aliened or *given* the *Whole* of his Land to hold of himſelf; becauſe then this Chapter, prohibiting it for the Future, would have been a Reſtraint upon the Tenant's Liberty at Common Law: but they plainly ſuppoſe ſuch *Gifts* or Alienations to have been unlawful, which are therefore reſtrained meerly in Confirmation of the Common Law. And it is obſervable that, though this Chapter of *Magna Charta* allows the Tenants of Common Lords the Liberty they claimed, of *giving* a reaſonable *Part* of their Lands to hold of themſelves; yet it

Terrarum, a Word of *Subinfeudation*; the Law before that Statute (without any Words of Reſervation) creating a Tenure between the Donor and the Donee, or Feoffor and Feoffee, as now called.

(g) The Words *de reſiduo Terræ & feodi Servitium* plainly diſtinguiſh between the *Land* and the *Fee*; inaſmuch as the *Reſidue* of the *Land* was to anſwer the Service of the *whole Fee*.

was

was not underſtood to allow the King's Tenants the like Liberty of giving or diſpoſing any of their Lands to hold of themſelves (h).

Hitherto

(h) The Lord *Coke* (2 *Inſ.* 65) ſays, that the Tenant of a common Perſon might, before this Chapter of *Magna Charta*, have made a Feoffment of Parcel of his Tenancy, to hold of himſelf: But that it was doubted in the King's Caſe whether his Tenant might or no——— And if it was a Doubt before, it muſt remain ſo notwithſtanding this Law, which is meerly reſtrictive, and not enabling: But when, or upon what Ground this Doubt or Difference was firſt made, he does not ſay, nor is it to be conceived; ſince it is clear that *Subinfeudations* were warranted by the Feudal Law, (*ut ſup. p.* 156. m.) and that they were an original and neceſſary Branch of the feudal Policy itſelf, (*Vid. Sup. p.* 7, 8.) and tho' ſome Modern Feudiſts ſeem to countenance this Difference; (*Vid. Stry. exam. jur. feud. cap.* 19. *Q.* 26. *Schilt. Com. ad Cod. jur. aleman. Cap.* 49.) yet it ſeems to be rather a *Local*, than a *general feudal* Diſtinction; and therefore it is Matter of Inquiry, when it was firſt ſtarted in *England*: For though the Lord *Coke* ſays, that it was a Doubt before *Magna Charta*; yet it is not to be imagined that it was always a Doubt, becauſe the many ſubordinate Tenures and Manors ſubſiſting at this Day, are ſo many Evidences, that it was not: And that it was not doubted until the Time of *Henry* III. is highly probable from the Stat. 34 *Edw.* III. *Cap.* 15. which makes good all ſuch Alienations made by People who held of the King's *Great Grandfather*, or of other Kings before him, expreſly *ſaving* his *Prerogative* of the Time of his *Grandfather*, *Father*, and *of his own Time*.

This Saving of the King's *Prerogative* from the Time of *Henry* III. and not of the Times before him, muſt appear ſomewhat extraordinary, unleſs ſuch Alienations were firſt queſtioned in his Time; and if ſo, the *Saving*

Hitherto the Doctrine of Alienation, whether to hold of the Lord, or of the Tenant himſelf, ſeems to have been clearly Feudal; and the firſt Statute that materially varied from the

Saving of the Prerogative from that time may reaſonably enough be accounted for; inaſmuch as ſuch Perſons, as aliened afterwards might be thought to have done it with their Eyes open, and in Defiance of the *Prerogative*, which the King therefore from that Time inſiſted upon.

Hence then we may ſuppoſe it partly ariſes, that a *new Manor* cannot be created at this Day; for if this Statute was thought neceſſary, as plainly it was, to make ſuch Alienations good from the Time of *Henry* III. the Saving of the King's *Prerogative* from that Time implied, that they were not from that Time to be countenanced; And tho' Sir *Henry Spelman* (*Poſthum. Treat. of ancient Deeds* 250.) ſuppoſes, that the Courſe of creating *new Manors* was ſtopt by the Statute *Quia Emptores Terrarum*, which reſtrained the Tenants of common Perſons from aliening to hold of themſelves; yet it could not intirely ſtop it; ſince the King's Tenants in *Capite* were not within the Reſtraint or Licence of that Law, and might, *as they conceived*, alien to hold of themſelves, until they were in Effect reſtrained by the above-mentioned Statute of *Edward* III.

Brook, *Roll* and *Finch* give us another Reaſon, independent of both theſe Statutes, why a Man cannot at this Day create a *new Manor*, notwithſtanding he give, ſay they, Land to many ſeverally in Tail, to hold of him by Services and Suit of Court; for tho', ſay they again, he may make a *Tenure*, yet he cannot make a *Manor*, becauſe a *Manor* cannot be without a *Court*, and a *Court* cannot be but by Continuance Time out of Mind. *Vid. Bro. Tit. Compriſ.* 31, 34. *Tit. Tenure* 102. 2 *Roll. Ab.* 120. *Finch of Law* 142.———But it is an obvious Objection to this Reaſoning, that the like Reaſoning might have prevented any Manors at all.

Law

Law of FEUDS in this Particular, was the Stat. *Quia Emptores Terrarum*, 18 *Edw.* I. which reciting the Inconveniences of *Feoffments* to hold of the *Feoffors*, and *not* of the *Lords of* the *Fee*, granted *Quod de cætero Liceat unicuique Libero Homini terras ſuas ſeu tenementa ſua, ſeu partem inde ad Voluntatem ſuam* vendere, *Ita tamen Quod feoffatus teneat terram illam ſeu tenementum illud de capitali Domino feodi illius per eadem Servitia & Conſuetudines, per Quæ feoffator ſuus illa prius tenuit.* So that this *Statute* took from the Tenants of Common Lords the feudal Liberty they claimed of diſpoſing Part of their Lands *to hold of themſelves*, and, inſtead of it, gave them a general Licence to ſell all, or any Part, to hold of the *next immediate Lord* (i), which they could not have done before, without the Conſent of the Lord.

(i) The Words *de Capitali Domino* in this Statute are to be underſtood of the next immediate Lord. 2 *Inſt.* 501. and *Dominus Rex*, and *Dominus Capitalis* are in this Senſe diſtinguiſhed. *Bract. Lib.* 2. *Cap.* 16. *Sect.* 7.

This

This Statute however, not extending to the King or his Tenants in *Capite*, left them as they ſtood at Common Law, (k) until the Statute *de Prærogativa Regis*, 17 *Ed.* 2. *cap.* 6. *viz. Nullus qui de Rege tenet in Capite per ſervitium militare poteſt alienare Majorem Partem terrarum ſuarum ita quod reſiduum non ſufficiat ad faciendum Servitium ſuum ſine Licentia Regis, ſed hoc non conſuevit intelligi de membris & particulis* (l) *earundem terrarum.* *Stanford* underſtands this Reſtraint of Alienation of the *greater* Part without Licence, as a Conceſſion, that ſuch Tenant might alien the *leſs* (m); and yet it doth not appear that Alienations, *even* of *Part* with-

(k) Vid. F. N. B. 175. A. 211. I. 235. A. Lit. Sect. 140. 1 Inſ. 43. b. 99. a. 133. b. 2 Inſ. 67. a.

(l) This Declaration ſeems very extraordinary, inaſmuch as it doth not appear, that the King's Tenants could, more than other Tenants at Common Law, alien to hold of their Lord without his Licence: And inaſmuch as it was a Doubt from the Time of *Henry* III. to this Time, and for many Years after, whether ſuch Tenants could, as the Tenants of common Perſons, alien any Part to hold of themſelves. *Vid. Sup.* 159. m.

(m) Stanf. de Prærog. Reg. 30. a.

out Licence, were ever practiſed by the *King*'s Tenants in *Capite*, after this *Statute*: The Reaſon poſſibly might be, that as enough was, even by this *Statute* of *Prerogative*, to be kept in all Events to anſwer the Services, which were the Tenant's *Equivalent* for the *Whole*, nothing *leſs* than the *Whole* was thought ſufficient to anſwer them (n).

But tho' the Statute *Quia Emptores Terrarum* did not ſet the *King*'s Tenants in *Capite* at Liberty to alien without Licence, yet it impowered every one, who held of the *King* as of an *Honor*, *Barony*, *Manor*, or *Seigniory*, and *not* in *Capite*, to alien without Licence; and the Reaſon why the *King* was bound in the one Caſe and not in the other, ſeems to have been, that it is declared by *Magna Charta*, *Cap.* 31. that *Si quis*

(n) And therefore if a Tenant of the King, even after this Statute, aliened any Part of the Land without his Licence, the King might diſtrain in that Part for the whole Rent or Service. *Stanf. de Prærog. Regis* 30. a.

tenuerit

tenuerit de aliqua Eſchaeta ſicut de Honore Wallingford——*Et de aliis Eſchaetis quæ ſunt in manu noſtra & ſint* Baroniæ (o) *non faciet nobis aliud ſervitium quam faceret Baroni, ſi Baronia eſſet in manu Baronis, & nos eodem modo eam tenebimus quo Baro eam tenuit*——So that the *King* was not, ſtrictly ſpeaking, bound by the Statute *Quia Emptores Terrarum*; but by this Chapter of *Magna Charta*, in which he declares that he would hold a *Barony*, as the *Baron* held it, and is therefore bound, becauſe the *Baron* was or would have been bound by the Statute *Quia Emptores Terrarum*: And becauſe Seiſures were made, not-

(o) *i. e.* Baronies, Manors or Seigniories. 2 *Inſ.* 64. for Manors were anciently called Baronies, as appears from Sir *H. Spelman (Gloſſ. ad Verb. Manerium)* who ſays, that *Manerium eſt Feodum nobile, partim Vaſallis conceſſum, partim Domino in uſum Familiæ ſuæ cum Juriſdictione in vaſallos ob conceſſa prædia reſervatum, totum vero feodum Dominium appellatur, olim Baronia, unde Curia quæ huic præeſt Juriſdictioni hodie Curia Baronis nomen retinet*——And the ſame Author *(ad Verbum Baronia)* ſays, that *Baronia dicitur Quandoq; pro Manerio quandoq; pro Manerii territorio.*

withſtanding this Chapter of *Magna Charta*, for Alienations and Purchaſes of Lands ſo holden without Licence; it is declared by the Statute 1 *Ed.* III. *Cap.* 13. that no man ſhould from thenceforth be grieved by any ſuch Purchaſe (p).

Upon this Conſtruction of the Statutes *Quia Emptores Terrarum & de Prærogativa Regis*, the *King*'s Conſent being neceſſary to every Alienation of his Tenants in *Capite*, it was for ſome Years a Queſtion, Whether, if ſuch Tenant aliened without Licence, the Land ſo aliened was not *forfeited*; or whether the *King* ſhould only *ſeiſe* it by Way of *Diſtreſs*, until a Fine ſhould be paid for the Contempt (q); but this Queſtion was ſettled by the Statute 1 *Edw.* III. *Cap.* 12. by which it is enacted, that the King ſhould not hold Lands ſo aliened, as forfeit; but that from

(p) Vid. F. N. B. 175. A. Bro. Tit. Alienation, 33, 34.
(q) 2 Inſ. 66. 1 Inſ. 43. b. Britton, Cap. 18. *fo.* 29. a.

thence-

thenceforth a reaſonable Fine ſhould be taken. But it remained much longer a Queſtion, Whether the *King*'s Tenants might have aliened any *Part* of their Lands *to hold of themſelves*, as the Tenants of Common Lords might, before the Statute *Quia Emptores Terrarum*; but ſuch Alienations made by Tenants, which held of *Hen.* III. or of *other Kings before* him, were at length made good by the Statute 34 *Edw.* III. *Cap.* 15. *ſaving* to the *King* his *Prerogative* (r) of the Time of his *Grandfather*, *Father*, and of his *own Time*.

(r) *Stanford* and the Lord *Coke*, both of them, ſuppoſe that this *Prerogative* was to have a *Fine only* for ſuch Alienation. *Stanf. de Prærog. Reg.* 29. b. 30. a. 2 *Inſ.* 65. *Quære F. N. B.* 235. c. But this could not be the Prerogative to the Time of *Edw.* III. becauſe Fines for Alienation were *then firſt* (by the abovementioned Stat. 1 *Edw.* III. *Cap.* 12.) to be taken inſtead of the Lands which had, till that time, been claimed as forfeit: But, as by that Statute Fines were to be accepted upon all *Alienations* of the King's Tenants without Licence, it might be thought, that *Subinfeudations*, *i. e.* Alienations by the King's Tenants to hold of themſelves, were within the Equity of that Law, and that Fines ought therefore upon ſuch Alienations to have been accepted from that Time, whatſoever Right or Claim the King might formerly have had to the Lands themſelves.

Whatſoever the *Prerogative* was in this Particular, it is clear that Fines for Alienation were now (f) effectually Eſtabliſhed; and that they were conſtantly paid until the Statute 12 *Car.* 2. *Cap.* 24, which aboliſhed them together with many other Burthens of Tenure.

2. As a Tenant could not alien his *Fee* or *Tenure*, without the Conſent of his Lord, ſo neither could he, by the

(f) The Lord *Coke* infers from this Statute 34 *Ed.* III. that the King's Prerogative, to have a Fine for Alienation, began in the Reign of *Hen.* III. (2 *Inſ.* 65, 501. 1 *Inſ.* 43.); but that Statute, ſaving the Prerogative only from the Time of *Hen.* III. excluſive, cannot be underſtood to give, or even to ſuppoſe ſuch Fines in the Time of *Hen.* III. Sir *Hen. Spelman* therefore ſays, that Fines for Alienation were not found among us before *Edw.* I. his Time; and that they were not eſtabliſhed by any Law until 1 *Edw.* III. *Spelm. Treat. of Feuds* 34. And yet no Body can ſay, that the King did not, as no doubt he might, from the very Original of Tenures accept previous Fines for his Licence or conſent to alien, and Fines even ſubſequent to Alienation, where he was pleaſed ſo to do; though it cannot be made out that he was bound to do it, before the Stat. 1 *Edw.* III. and therefore we may date the Original of the known Fines for Alienation from this Statute, and neglect the reſt as occaſional Tranſactions only.

Feudal

Feudal (t) or *Common* Law, alien a *Fee*, that was not of his own Acquiſition or Purchaſe, that is to ſay, a *Fee* that was not originally conferred upon him, but that came to him by Diſcent, even with the Conſent of the Lord, without the Conſent of the Heir (u), *Qui proximus erat in Succeſſione collaterali* (x); for tho' the Law truſted an Anceſtor with the Intereſt of his own immediate Deſcendants (y); yet he could not prejudice

(t) *Alienatio feudi* paterni *non valet etiam Domini Voluntate, niſi agnatis conſentientibus, ad quos Beneficium quandoq; ſit reverſurum.* Feud. Lib. 2. Tit. 39. ——— Stry. Exam. jur. feud. Cap. 2. Q. 19. & Cap. 19. Q. 2. Crag. de jur. feud. 346. 348.

(u) *Niſi ubi Hæredes tenentur ad Warrantiam*, ſays Bract. Lib. 5. Cap. 10. Sect. 4. Vid. 1 Inſ. 94. b. Somn. Treat. of Gav. 39.

(x) Crag. de jur. feud. 346.

(y) The Law poſſibly preſuming, as the Lord *Coke* ſuppoſes in a Caſe of the like Nature, that no Man would unnaturally prefer a Stranger to the Heir of his own Blood; (1 Inſ. 373.) but *Crag.* gives another Reaſon, *viz.* that *Deſcendentium, ſi pater alienaverit, nulla habebatur ratio, quia ob Patris factum indigni reputabantur*, and that therefore *poteſtas conſentiendi ad proximum Agnatum a Latere devolvebatur. (Crag. de jur. feud.* 346.) This ſeems to be the better Reaſon, becauſe according to the Book of FEUDS, *Si vaſallus culpam committat, propter quam feudum amittere debeat, neque Filius neque ejus Deſcendentes ad id feudum revocabuntur, ſed Agnati* ——— Vid. Feud.

judice the next Collateral, who having a diſtinct, tho' remote Intereſt in the feudal Donation, could not be deprived of it, but by an Act of his own. This manifeſtly hints the Foundation, and partly ſuggeſts the Reaſon of *Collateral Warranty*; tho' it is not to be conceived, nor is it within my preſent Deſign to enquire, how it came to paſs, that the Concurrence or ſimple Conſent of the next Collateral, which was at Law requiſite to defeat his own Hopes of Succeſſion only, ſhould ſwell up to our Notions of *Collateral Warranty*, and be advanced into a mean to defeat even Eſtates, to which ſuch Collateral could have no poſſible Hopes of ſucceeding (z).

3. As a Tenant could not alien, ſo neither could he ſubject the *Te-*

Feud. Lib. 2. Tit. 26. 31. 98. *and* Zaſius in uſus feud. Cap. 10. Fo. 100, 101, 102.

(z) Vid. Lit. Sect. 709. 1 Inſ. 373. a.

nancy

nancy or *Fee* to his Debts (a); for if he might, the feudal Reſtreint of Alienation might have been eaſily fruſtrated. It was upon this Ground, that Lands were not, at the Common Law, liable to any Execution for the Debts of the Tenant (b), until the

(a) Although upon ſtrict feudal Principles, no Part of a *Feud* or *Fee* was liable to the Debts of the *Feudatary*; yet it muſt be confeſſed, that the feudal Text admits, that anciently, *Neceſſitate ſuadente, poterat Vaſallus Domino inſcio vel invito feudi partem (mediam* feud. Lib. 1. Tit. 3.) *vendere, retenta videlicet alia parte.* Feud. Lib. 2. Tit. 9. Zaſius in uſus feud. 68, 69. But this Practice was prohibited by a Conſtitution of *Lotharius. Feud. Lib.* 2. *Tit.* 52.——It appears by the *Cuſtumier* of *Normandy*, that a Man could not ſell or *engage* his *Fief*, without the Conſent of the Lord; but that it was notwithſtanding uſual to ſell or *engage* Part; viz. *aulcun ne peut vender ne engager, ſe neſt du Conſentment au Seigneur, la terre que tient de luy par hommage*; *Non pour tant aulcuns ont accouſtume a vendre ou engager le tiers ou moins, pour tant que il remain de Fief, tant que les droictures & les faiſances des Seigneurs & dignitez puiſſent eſtre faictes & payees aux Seigneurs.* Grand Cuſtum. de Norm. Cap. 29. Fo. 49.

(b) *i. e.* Other than ſuch as were due to the Lord upon Account of the *Tenancy* or *Fee* itſelf. All Lands being anciently, and in the King's Caſe even to this Day, clearly liable to all ſuch Debts; obſerving only the Reſtraint of *Magna Charta Cap.* 8. viz. *Nos vel Ballivi noſtri non ſeiſiemus terram aliquam vel redditum pro Debito aliquo quamdiu Catalla debitoris præſentia* (upon the Spot) *ſufficiunt ad debitum reddendum, & ipſe debitor paratus ſit inde ſatisfacere.*

Statute

Statute *Weſtm.* 2. *Cap.* 18. ſubjected a *Moiety* (c), leaving the other *Moiety* to ſupport and enable the Tenant to do the Services of the *Tenure.* This was the firſt Statute that any way ſubjected Lands to Execution; but ſeveral other Statutes, as the Statutes 13 *Edw.* I. *de Mercatoribus*, 27 *Edw.* III. *Cap.* 9. 23 *Hen.* VIII. *Cap.* 6. were afterwards made, by which Lands were ſubjected, in a ſpecial Manner, to the particular *Liens* created by thoſe Statutes.

4. As Tenants could not, by the Feudal or Common Law, alien their *Tenancies* without the Licence or Conſent of the Lord; ſo neither could the Lord himſelf alien his *Seigniory* (d), that is to ſay, transfer the *Fealty* and Services of his Tenants without their Conſent (e). Hence ſprung the Doctrine

(c) Vid. 2 Inſ. 394.

(d) Vid. Sup. p. 30.

(e) *Videndum ſi Dominus attornare poſſit alicui Homagium & ſervitium tenentis ſui contra voluntatem ipſius Tenentis: Et videtur quod non, & maxime Homagium, quia tale ſequeretur inconveniens quod poſſit eum ſubjugare Capitali Inimico ſuo, &*

per

trine of *Attornment*, which was partly avoided by the preſent Method of Conveying to *Uſes* (f), and is now, by a late *Statute* for Amendment of the Law, quite aboliſhed (g).

5. It was likewiſe, as is before obſerved (h), altogether as much againſt the Nature of a FEUD, that the Feudatary ſhould diſpoſe of it by *Will*, as that he ſhould otherwiſe alien it. Upon this Ground it was, that though Lands were deviſeable until the *Conqueſt* (i), or rather until the Eſtabliſhment of *Tenure*; yet then, or ſoon after (k), the Power of diſpoſing by *Will*

per quod teneretur Sacramentum fidelitatis facere ei, qui eum damnificare intenderet——*Eſt & alia cauſa quare homagium & ſervitium attornare non poſſit, ut ſi velit homagium attornare tali, qui nihil habeat in Bonis, unde poſſit warrantizare, defendere, & excambium facere.* Bract. Lib. 2. Cap. 35. Sect. 13. 1 Inſ. 309. a.

(f) Deviſed after the Statute 27 *H.* 8. *Cap.* 10.

(g) See the Stat. 4 *Annæ*, *Cap.* 16. *Sect.* 9.

(h) Vid. Sup. p. 31.

(i) Vid. Somn. Treat. of Gav. 84. 89. Spelm. Treat. of Feuds 22.

(k) After the Coming of the *Normans*——a *feudal* Tenant, or Tenant by *Knight-Service* (as we call him) could not deviſe his Land by *Will* before the Statute 32 *H.*

Will generally vaniſhed (l), except of *Socage* Lands and Tenements in ſome *Cities* and *Burroughs* (m), where it was retained (n), or rather indulged; it being of little Conſequence into what Hands ſuch *Tenures* fell. And thus far it is true, that *Nullum Teſtamentum apud nos manſit pro Lege* (o), until the

32 *H.* 8. though it were with Licence of the Lord, or of the King himſelf. *Spelm. Treat. of Feuds*, 21—25. The Lord *Hale* indeed, (Hiſt. of the Com. Law 222.) ſuppoſes, that the Anceſtor might, by *Will*, diſpoſe as well *Lands* as Goods, till the Time of *Hen.* II. but this ſeems to be contradicted by *Glanvil*, who wrote about that Time. *Vid. Glanv. Lib.* 7. *Cap.* 1. *p.* 45.

(l) As being contrary to the Nature of Tenures; for the Reſtraint of diſpoſing by *Will* was not meerly cautionary (as ſome have thought) leſt a Man ſhould do that in *Extremis*, that he would not have done in his Health, or with his Senſes about him; but it was ſtrictly *Feudal:* And the legal Apprehenſion, or Preſumption of Infirmity, ſeems to have been rather a Reaſon for continuing this Reſtraint ſo long after the Stat. *Quia Emp. Terr.* by which the Reſtraint of Alienation was taken away, than the Ground or Reaſon of the Reſtraint itſelf.

(m) At Common Law Lands were not deviſeable: But by Cuſtom in ancient Cities and Burroughs, Socage Lands and Tenements were deviſeable. *Lit. Sect.* 167. 6 *Rep.* 16, 17. *Spelm. Treat. of Feuds* 25.

(n) Vid. Somn. Treat. of Gav. 89, 90. Bacon Hiſt. of the Eng. Gov. 203.

(o) Vid. Spelm. Gloſſ. ad Verb. Gaveletum.

Statutes

Statutes 32 & 34 *Hen.* VIII. gave a *Teſtamentary* Power over Lands, ſubject only to the Reſtrictions and Conditions of thoſe Statutes. But though Lands were not, as is ſuggeſted, deviſeable from the Time of the *Conqueſt* until the Time of *Henry* VIII. yet upon a Diſtinction ſtarted, ſoon after the Statute *Quia Emptores Terrarum*, between the *Land* and the *Uſe* or Profits of the Land, *Feoffments* to *Uſes* were invented; by Means whereof a Man might, before the Statute 27 *H.* VIII. *Cap.* 10, by *Will* diſpoſe of the *Profits*, though he could not diſpoſe of the *Land* itſelf.

How far the Reader is ſatisfied concerning the Nature of *Tenure*, is not to be gueſſed; and therefore it may not be impertinent to ſhew, that the ſeeming Hardſhips in our Rules or Laws of Diſcent, as the Preference of the eldeſt Son, and of Males, the Excluſion of the Father and of the half Blood, are likewiſe Feudal, and that they

they are to be accounted for only as ſuch.

1. As to the Preference of the eldeſt Son, it is to be remembered, that though all FEUDS might, as above (p), originally fall among all the Sons; yet that Courſe of Succeſſion was varied (before any *Syſtem* of FEUDS was written or digeſted) in Conſequence of a *Conſtitution* of the *Emperor Frederick*, viz. *Ducatus, Marchia, Comitatus de cætero non dividatur* (q); upon which FEUDS in general were divided into *Feuda dividua & individua*; of the latter Sort amongſt us, as well as the *Normans* (r), were the *Honorary* and *Mili-*

(p) Vid Sup. p. 31. Spelm. Treat. of Feuds, 12. 43.

(q) Vid. Sup. p. 31, 32.

(r) Tout heritage eſt partable ou non partable: Len dict que l'heritage neſt pas partable en quoy aulcune partie ne peut eſtre ſoufferte entre les freres par le Couſtume de pays, ſicome le Fief de Haubert, Les Contes & les Baronies, & les Sergenteries, en quoy la Garde appartient aux Seigneurs tant que les Heires ſoient en Aage. L'heritage eſt appelle partable en quoy le Seigneur ne peut reclamer aulcune garde. Sicome ſont vavaſſoureries, & tout aultre tenement villain, & le Bordage & la Bourgage. *Grand Cuſtum. de Norm. Cap.* 26. *Fo.* 41. *b.*

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tary Fees or *Tenures*, to which the eldeſt Son, becauſe he was ſooneſt able to do the Duties of the *Fee* or *Tenure*, was in the Order of Succeſſion *ſingly* preferred. But to all other FEUDS, as being *diviſible*, all the Sons might equally ſucceed (f): And as for the *total Diſcent* even of *Honorary* and *Military Fees*, whether it obtained in *England*, before the above-mentioned *Conſtitution*, or afterwards (t), as a thing agreeable to the

(f) *Cum quis Hæreditatem habens moriatur* —— *Si plures reliquerit filios* —— *diſtinguitur utrum ille fuerit Miles, ſive per feodum militare tenens, aut Liber Sokemannus: Quia ſi miles fuerit vel per militiam tenens, tunc ſecundum jus Regni Angliæ primogenitus filius patri ſuccedit in totum. Ita quod nullus fratrum ſuorum partem inde de jure petere poteſt. Si vero fuerit Liber Sokemannus, tunc quidem dividetur hæreditas inter omnes filios, quotquot ſunt, per partes æquales, ſi fuerit Socagium & id* antiquitus diviſum. Glanv. Lib. 7. Cap. 3. p. 49. a.

(t) Mr. *Somner* ſuppoſes, that no one can doubt, that the Diſcent of *Knight-Service* Land to the eldeſt Son alone was leſs ancient than the *Conqueſt*. (*Vid. Somn. Treat. of Gav.* 82. 89.) Whereas this was a Conſtitution of *Frederick* I. who was not choſen Emperor until the Year 1152, or (as *Mat. Weſtm.* ſays) 1155, which was about the Time of our *Henry* II. in whoſe Time the Lord *Hale* ſays the total Diſcent firſt prevailed in *England*; (*vid. Hale Hiſt. of the Common Law* 221, 222, 226, &c.) and if ſo, it

the Deſign and Nature of FEUDS, or whether it obtained with us in Imitation of other Countries, or by Virtue of an expreſs Law of our own (u), is not worth our Inquiry; ſince it is certain, that it was thought convenient to preſerve the *Fee*, and the Services of the *Fee* intire, as the beſt Means to maintain the military Force of the Kingdom upon a regular and eſtabliſhed Foot (x); and that it did therefore every where prevail, and was every where inviolably obſerved (y): But *Socage Tenures* not being of the ſame Importance, as

is not impoſſible that this Conſtitution ſhould, in ſome Degree, hint or forward it; for though this, or any other imperial Conſtitution, could not as ſuch affect us; yet the Ground or Reaſon of it being Feudal might prevail, as ſuch.

(u) No Notice or Hint of any ſuch Law is to be found, ſave only that the Author of the *Mirror* ſays, that among the Conſtitutions of our old Kings, *ordain fuit que Fee de Chivaler deviendroit al eigne fits per Succeſſion de Heritage & que Socage Fee fuit partable perenter les males Infants.* Vid. Mir. des Juſt. Liv. 1. Cap. 1. Sect. 3.

(x) Vid. Somn. Treat. of Gav. 82. 1 Inſ. 14. a. Hale Hiſt. of the Com. Law 223.

(y) Even in *Kent.* Hale Hiſt. of the Common Law, 225.

the *Honorary* and *military Tenures*, were, as *Feuda dividua*, left to deſcend, according to the old Uſages and Cuſtoms of the ſeveral Parts of the Kingdom where they lay (z). Inſomuch that it was ſome Time after the *total Diſcent* had, as above, prevailed, that *Socage*, in Imitation of the more Honourable *Tenures*, began generally (except in *Kent* and ſome particular FEUDS and Places, ſays the Lord *Hale* (a), which adhered to their Old Uſages and Cuſtoms) to deſcend to the eldeſt Son; but where the total Diſcent was not admitted, the old cuſtomary Diſcent remained, and muſt ſtill anſwer for the particular local Diſcents (b) remaining at this Day.

2. As to the Preference of *Males*, it muſt be remembered, that *Females*

(z) Somn. Treat. of Gav. 82, 90.

(a) Vid. Hale Hiſt. of the Com. Law 119, 120, 153, 154, 226, 228.

(b) As of Lands of the Nature of *Borough Engliſh*, *Gavelkind* and the like. *Vid. Lit. Sect.* 165, 210, 211.

could not by the Feudal Law ſucceed to a *proper* FEUD; becauſe they were unequal to the Duties or Services, for the ſake of which it was chiefly created (c). And if it be farther obſerved, that it is *ex pacto*, or by the *Cuſtom* of particular Countries, that they are even at this Day admitted to ſucceed to any (d); it cannot ſeem ſtrange, that the feudal Preference given to *Males* (e) ſhould prevail with us: Becauſe as *Feud*, *Fee*, and *Tenure*, are Synonimies, and import but one and the ſame Policy, ſuch Preference is plainly agreeable to the

(c) Vid. Sup. p. 28.

(d) *Proles fœminei ſexus, vel ex fœmineo ſexu deſcendens, ad ſucceſſionem aſpirare non poteſt, niſi ejus Conditionis ſit feudum, vel ex pacto acquiſitum.* Vid. Feud. Lib. 2. Tit. 2. Sect. 2. Tit. 11. 30. 50. 104. Stry. Exam. jur. Feud. Cap. 4. Q. 9. *Fœmininum Feudum eſt, quod vel a Fœmina deſcendit, vel in quod Fœminæ ſuccedunt, quod cum a propria feudi Natura abhorreat——aliunde ex pacto, aut a moribus Regionum, ſive Provinciarum introductum eſt.* Crag. de jur. Feud. 52, 236, 237.

(e) Vid. Feud. Lib. 1. Tit. 6. & Lib. 2. Tit. 11, 17. Hanneton. de jure Feud. Lib. 2. Cap. 9. Stry. Exam. jur. Feud. Cap. 4. Q. 12. Crag. de jur. Feud. 53.

Nature of *Tenures*, and highly reaſonable (f).

3. As to the Excluſion of the Father from any poſſibility of ſucceeding to the Son's Inheritance, as ſuch, it is certain, that the Father cannot ſucceed to the Son; becauſe it is againſt the feudal Rules and Courſe of Succeſſion (g), which did not obtain againſt

(f) Vid. LL. H. 1. Cap. 70. Stat. de Prærog. Regis Cap. 16. Glanv. Lib. 7. Cap. 3. p. 50. a. Somn. Treat. of Gav. f. 8.

(g) *Succeſſionis feudi talis eſt Natura quod aſcendentes non ſuccedunt, verbi gratia, Pater filio.* Feud. Lib. 2. Tit. 50, 84. Ravenna in Conſuetud. Feud. Tit. 50. Upon which the Maxim in our Law, *Que Enheritance poet lineal-ment diſcender, mes nemy aſcender*, (Lit. Sect. 3.) may be ſuppoſed to be grounded.

In this Reſpect the Alodial and Feudal Property differed (*Vid. Hanneton. de jure feud. Lib. 2. Cap. 5. p. 164*) It appears *Int. Leg. Salicas, Tit. 62. D'Alode, & Int. Leg. Ripuariorum Tit. 56. De Alodibus*, that *Si quis mortuus fuerit & filios non dimiſerit, ſi pater aut mater ſuperfuerint, ipſi in Hæreditatem ſuccedant*; (*Vid. Linden. Collect. Leg. Antiq.*) And, as this ſeemed highly reaſonable, the feudal Courſe of Succeſſion was in *Normandy* varied in Favour of the Father; viz. *Sil nya aulcun des freres ne de leur Enfants l'heritage revient au pere de que les freres yiſſirent. Et ſil eſt mort il reviendra a ſes freres que ſont oncles a celuy de qui il Eſchat. Et ſil nya aulcun des oncles ne de leurs Enfants il reviendra a lael.* Grand. Cuſtum. de Norm. Cap. 25. fo. 40. a.———And there is a Law of our *Henry* I. to the ſame Effect, viz. *Siquis ſine Liberis deceſſerit, Pater*

gainſt Reaſon; for if the FEUD was really what the Feudiſts called *antiquum aut Paternum* (h), the Father could not ſucceed to it, becauſe it muſt have paſſed him, before it could poſſibly have come to the Son (i). And if a FEUD was newly and originally given to, or conferred upon the Son *ut feudum Antiquum*, ſuch FEUD did in all Reſpects deſcend, as if it had been really an *ancient* or *paternal Feud* (k); which muſt, as is

Pater aut mater ejus in Hæreditatem ſuccedant, &c. (Vid. LL. H. 1. Cap. 70.) But I do not find that this Law, which, though agreeable to the Cuſtumary of *Normandy*, was ſo contrary to the feudal Rules of Succeſſion, was ever obſerved. *Vid.* 1 *Inſ.* 11. *a. Hale Hiſt. of the Com. Law* 226, 227.

(h) Vid. Sup. p. 25.

(i) *Si Feudum de cujus Succeſſione agitur Paternum vel Antiquum ſit, Patrem filio vel Avum Nepoti, & ſic deinceps ſuccedere impoſſibile eſt, cum feudum paternum vel antiquum a Patre vel Avo in Filium vel Nepotem, & ſic deinceps, deſluat.* Hanneton. de jure Feud. p. 164. Stry. Exam. jur. Feud. Cap. 16. Q. 2, 3, 4. Zaſius in uſus Feud. Cap. 8. fo. 46.

(k) *Moribus receptum eſt, quod feudum novum, antiqui feudi jure concedi poſſit, & Antiqui Naturam aſſumet.* Zaſius in uſus Feud. Cap. 12. fo. 124.——*eatenus*——*ut illud feudum novum juris antiqui habeatur, id eſt ut eadem Privilegia habeat, & eoſdem affectus quos antiquum.* Crag. de jur. Feud. 55.

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ſaid before, have paſſed the Father, before it could have come to the Son, and upon this Notion the Father was in this Caſe excluded. On the other Hand, if the FEUD was what the Feudiſts call *Novum* (l), that is to ſay, newly conferred upon, or (as we ſay) purchaſed by the Son, and not granted to him *ut Feudum antiquum*, it could only deſcend to his Children; (m) and if he had no Children, it could not *mount* to the Father, or *incline* to any Collateral, but ſhould *return* to the Lord (n). And thus the Father was totally excluded. Thus ſtood the Feudal Law, becauſe whoſoever would ſucceed to a FEUD muſt

(l) Vid. Sup. p. 25.

(m) *Nomen hæredis in prima inveſtitura expreſſum tantum ad Deſcendentes ex Corpore vaſalli primi extenditur———In jure Deſcendentes tantummodo ſuccedunt in Feudo novo.* Crag. de jur. Feud. 50, 52. Stry. Exam. jur. Feud. Cap. 16. Q. 4, 5.

(n) *Sin autem novum fuerit, vaſallo, qui ipſum recepit, ſine liberis Maſculis decedente, neque ejuſdem Patri, avo, proavo, & ſic deinceps ulteriori aſcendenti, nec ejuſdem Agnatis defertur: Sed ſtatim ad Dominum ipſum regredietur.* Hanneton. de jur. Feud. Lib. 2. Cap. 5. p. 164. Zaſius in uſus Feud. Cap. 8. fo. 46.

have intitled himſelf to the Succeſſion in a regular Courſe of Diſcent from the firſt Feudatary (o), or Purchaſer; and this was, no doubt, the Ground of that old and true *Maxim* (as the Lord *Coke* calls it) (p) in our Law, that none ſhall inherit any Lands as Heir, but only the Blood of the firſt Purchaſer. But it may be objected, that this *Maxim*, and the Gloſſes or Reaſoning upon it, will not hold with us at this Day, becauſe it is (now at leaſt) ſufficient by our Law, that the Perſon, who claims a *Fee* by *Diſcent*, must make it appear that he is Heir to him *who was laſt actually ſeiſed* (q); and that it is therefore ſtrange (r), that the Father, who is

(o) *Semper enim feudum ſtipitem reſpicit, quod nulli niſi ex ſtipite ſuccedant.* Crag. de jur. Feud. 55. ſup. 18.

(p) 1 Inſ. 12. a.

(q) But this Rule does not extend to Eſtates Tail, Dignities, or Crown Lands. *Vid.* 1 *Inſ.* 11. b. 15. a. b. 3 *Rep.* 41, 42.

(r) *Mirum cuivis videri poſſit, cum Pater Patruo uno gradu ſit filio propior, tamen illi (ſcilt' Angli) prohibent patrem a filii ſucceſſione, Patruumq; defuncti Patris fratrem ei præferunt, Quod ſi is Patruus ſine Liberis deceſſerit, ei in omnibus*

is next in Blood, ſhould not be Heir to his Son, and next in Succeſſion; but that the Uncle or Father's Brother ſhould be preferred to him; and yet that, in Caſe the Uncle died without Iſſue, the *Father* ſhould be admitted, as *Brother* to the *Uncle*, to ſucceed to the Son's Inheritance (f).

To this it may be anſwered, that the ſeeming Hardſhip or Abſurdity ariſes from a Miſapprehenſion of this Rule, conſidering it as a ſubſtantive Rule of Diſcent; whereas it is not properly a Rule of Diſcent; but of Evidence, and is not therefore Subſtantive, but relative to the old feudal Courſe of Succeſſion, and calculated to make that good as far as poſſible; for it becoming in many Caſes impoſſible, by Length of Time

bus ſuccedet ejus frater, qui defuncti erat pater, & ſic pater ad hæreditatem & ſucceſſionem filii pervenire poterit, ſed non ut pater, ſed ut frater patrui, &c. Crag. de jur. Feud. 234.

(f) Vid. Lit. Sect. 3.

and a long Courſe of Diſcents, to deduce a Title from the firſt Feudatary or Purchaſer, Proof of being Heir to the laſt was neceſſarily allowed as the beſt Proof that could be expected of Title from the firſt. Hence therefore it is, that the Father, though he ſtands upon the old Foot as to the Son himſelf, yet, as he may, within the feudal Rules of Succeſſion, ſucceed to the Uncle as his Brother, may, as Heir to his Brother (t), make Title even to the Son's Inheritance paſſing through him; our Law, for the Reaſon above-mentioned, looking no farther Back than to the Uncle, who was the Perſon laſt actually ſeiſed. And it is obſervable, that the Caution with which this Rule was admitted, ſhews evidently, that it was not innovating or meant to vary the old Courſe or Rules of Diſcent, but that it was deviſed meerly to ſubſtitute a

(t) For the Brother or Siſter *cum ſeiſinam ſuam obtinuerunt, ſ. ipitem faciunt, &c.* Fleta L.b. 6. Cap. 2. Sect. 2.

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reaſonable in the ſtead of an impoſſible Proof; for the Perſon who would, within the Senſe and Intent of this Rule, intitle himſelf to a *Fee* by *Diſcent*, muſt be Heir of the *whole Blood* to him who was laſt ſeiſed (u), and as ſuch, of the Blood of the firſt Purchaſer. It is upon this Ground therefore, that *Poſſeſſio fratris facit ſororem eſſe Hæredem*, and that the *half Blood* is excluded (x). And thus the Excluſion of the *half Blood*, which hath been thought ſtrange (y), is to be accounted for, as a thing grounded upon tolerable Reaſon.

A *Fee Tail*, as diſtinguiſhed from a *Fee Simple*, is a *Fee limited* and re-

(u) Vid. Lit. Sect. 6, 7, 8. 1 Inſ. 15.

(x) Contrary to the Cuſtom of *Normandy* and to the Laws of *Scotland*. *Vid. Cuſtum. de Norm. Cap.* 25. *fo.* 41. b. *Hale Hiſt. of the Com. Law* 219. *Crag. de jur. feud.* 244.

(y) *Mirum quod ab Anglis obſervatur, ſiquis cum duas conjuges haberet, ex una filium, ex altera plures filios, & poſt mortem patris hic filius hæreditatem paternam Agnoverit, deſervituſque in hæredem patri fuerat, poſtea & ipſe moriatur, non tamen ei ſuccedit frater Conſanguineus in hæreditate, nec enim eſt ex toto ſanguine ut illi loquuntur.* Crag. de jur. Feud. 243.

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ſtrained to ſome *particular* Heirs excluſive of others (z), as to the Heirs Male of the Body of the Donee or Feudatary, excluſive of Females and Collaterals; or to the Heirs of his or her Body, excluſive of Collaterals only. It was firſt called a *Fee Tail* from the *French* Word *Tailler*, *Scindere* (a), upon Account of the particular Limitation or Reſtriction by which the Heir general was often, and collateral or remote Heirs were always cut off (b). But ſuch *Fee*, that is to ſay a *Fee* thus limited, was at Common Law known by the Name of a *Fee Conditional*, ſo called from the Condition expreſſed or implied in the Gift or Conſtitution of the *Fee*, that in Caſe the Donee died

(z) *Donationum, alia abſoluta & larga, & alia ſtricta & coarctata, ſicut certis hæredibus, quibuſdam a Succeſſione excluſis.* Fleta, Lib. 3. Cap. 3. Bract. Lib. 2. Cap. 5. Sect. 3. Brit. Cap. 34. p. 89. a. Lit. Sect. 18.

(a) Vid. 1 Inſ. 18. b. & Skinner Etymol. Ling. Angl.

(b) *Feodum talliatum eſt quod ita talliatur, hoc eſt amputatur & reſcinditur, ut ad nullos tranſeat hæredes niſi a corpore, &c.* Spelm. Gloſſ. ad Verb. Feodum.

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without ſuch *particular* Heirs, the Land or *Fee* ſhould *revert* to the Donor (c). But notwithſtanding ſuch Limitation or Reſtriction was agreeable to the Nature of FEUDS (d), and the Condition itſelf no other than (whether expreſſed or not) was implied in every ſuch Gift (e); yet our Anceſtors were, after Heir or Iſſue had, ſuffered at Common Law to alien ſuch *Fee* (f), and to defeat the Donor as well as the Heir, upon

(c) It appears by the Preamble of the Statute *de Donis*, that the Limitation of a *Fee Conditional* at Common Law, was the ſame as that of a *Fee Tail* at this Day.

(d) *Jus feudale——non Solum talliis non adverſari ſed maxime eis favere conſtat, non ſolum quod nullas fœminas ad ſucceſſionem admittit——Sed multo magis quod tenorem Conceſſionis ſemper ſervandum jubeat, hæreditatemq; ſecundum eam deferendam expreſſe jubeat, &c.* Crag. de jur. Feud. 147.

(e) *Car Syl nuſt ceo expreſſe per parols, uncore tant fuit imply en le done——Et ſi les parols fueront expreſſe en le fait de done, uncore ne fuyt Condition en fait, mes ſerroit Condition en Ley.* Dit per Weſton Juſtice, Plowd. Com. 241. b. 242. a.

(f) Juſtice *Brown* reckons this one of many Torts permitted at Common Law without Redreſs; and that this was tortious, he infers from the Statute *de Donis* itſelf. *Plowd. Com.* 247.

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a Suppoſition, that the Condition was for this Purpoſe ſatisfied or perform'd by the Donee's having Iſſue (g): This Notion and the conſequent Practice, being manifeſtly contrary to the Form and Intent of the Gift, was reformed by the Statute of *Weſtm.* 2. *Cap.* 1. (commonly called the Statute *de Donis)* which required, that from thenceforth the *Will* and Intent of the Donor ſhould be obſerved, and that a *Fee* ſo given ſhould in all Events go to the Iſſue, and for want of Iſſue, revert to the Donor (h): ſo that, though *Littleton* ſays, that a *Fee Tail* is by Force of this Statute; for that, before, all Inheritances were *Fees* Simple, *Abſolute* or

(g) Vid. 1 Inſ. 19. a. Plowd. Com. 242, 245. b. 247. a.

(h) *Dominus Rex Statuit, quod voluntas Donatoris, ſecundum formam in Charta Doni ſui manifeſte expreſſam, de cætero obſervetur, ita quod non habeant illi, quibus tenementum ſic fuit datum ſub Conditione, poteſtatem alienandi tenementum ſic datum, quo minus ad exitum illorum, quibus tenementum ſic fuerit datum, remaneat poſt eorum obitum, vel ad Donatorem vel ad ejus Hæredem, ſi exitus deficiat, revertatur.* Stat. de Weſtm. 2. Cap. 1. 2 Inſ. 332.

Condi-

Conditional (i); yet it is certain, that this Statute did not create any new *Fee, aut re aut nomine*, but that it only ſevered and diſtinguiſhed the Limitation from the Condition, and reſtored the Effect of each, that is to ſay, the Effect of the Limitation to the Iſſue; and the reverſion, as the proper Effect of the Condition, to the Donor (k), according to the Plain Import and manifeſt Intent of the Gift: And yet, as by Means of this Statute the Limitation was raiſed above the Condition, the *Fee* might thenceforth be denominated from the Limitation, which as now eſtabliſhed, was become the Subſtance, as it was in Truth, before, the immediate End of the Gift.

II. Eſtates for *Life* are either *Conventional* or *Legal:* Of the firſt Sort are ſuch Eſtates, as are in their Crea-

(i) Lit. Sect. 13.
(k) Vid. Plowd. Com. 242. a. 247. b. 248. a.

tion

tion *expreſly* given or conferred for the *Life* of the Tenant only: Of the ſecond Sort are Tenancies in *Tail, after Poſſibility of Iſſue extinct*, Tenancies in *Dower*, and by the *Curteſy*: which are particular Eſtates, not created or limited by any poſitive Act or Proviſion of the Parties, but by the Diſpoſition and Order of the Cuſtomary or Common Law of *England*.

1. *Conventional* Eſtates for *Life*, though they in many Reſpects differ from Eſtates in *Fee*, are nevertheleſs of a feudal Nature, and fall properly within the feudal Senſe of the Word *Beneficium* (1); for they are given or conferred by the ſame Rites, and with the ſame Solemnity as *Fees*, and are held by *Fealty*, and ſuch conventional Services as the Lord and Tenant agree upon.

2. A Tenancy in *Tail after Poſſibility of Iſſue extinct*, being a *ſpecial* Eſtate *Tail* without Poſſibility of

(1) Vid. Supp. p. 19.

Suc-

Succeſſion or Continuance beyond the Life of the Tenant (m), was held by the ſame Services, continued to be of the ſame Nature, and was, no doubt, as much a FEUD, as the Eſtate *Tail* ever was; ſo that it is diſtinguiſhed by this particular Name or Deſcription, meerly to ſuggeſt the legal Diſadvantages (n) caſt upon ſuch Eſtate *Tail*, when turned to an hopeleſs Inheritance.

Dower (o), called by *Crag Triens & Tertia* (p), and known to the Feudiſts (q) by ſeveral other Names (r), was probably brought into *Eng-*

(m) Vid. Lit. Sect. 32, 33, 34.

(n) Vid. 1 Inſ. 28. a.

(o) The legal Senſe and Qualities of it are largely explained by *Littleton* and *Coke*. 1 Inſ. 30. b. *&c.*

(p) Vid. Crag. de jur. Feud. 308.

(q) And yet according to *Schilter*, *veteri jure feudali Dotalitium in feudo conſtitui vix poterat*; *quam ſententiam adhuc ſequuntur Weſenbechius*, *Koepen*——*Et alii*: *Introductum tamen fuit a Friderico* II. *Imp. ut in Feudo Dotalitium conſtitui poſſit.* Vide Schilt. Inſtit. jur. Feud. Cap. 6. Sect. 17. & Cap. 7. Sect. 8.

(r) Vid. Hotoman de Verb. Feudal. ſub Verb. Dotalitium & Morganatica. Skene de Verb. ſignificat. ad Verb, Dos; & Spelm. Gloſs. ad Verb Doarium & Morgangiva.

land

land by the *Normans*, as a Branch of their Doctrine of *Fiefs* or *Tenures* (f); for we find no Footſteps of Dower in Lands, until the Time of the *Normans* (t): But on the contrary, Proviſion is made, by one of the Laws of the *Saxon* King *Edmund* (u), for the Support of the Wife ſurviving her Huſband, out of his Goods only (x).

Tenancies by the *Curteſy* (y), or *per Legem terræ*, though ſo called as

(f) Vid. Cuſtum. de Norm. Cap. 101. fo. 124. & Le Stille de proceder en Norm. fo. 76.

(t) Vid. Bacon. Hiſt. of the Eng. Gov. 104, 146, 147.

(u) Cap. 51.

(x) Nor was there any *Dower* in *Wales* until it was annexed to the *Crown* of *England*, as appears by the *Statuta Walliæ*, *viz. Quia Mulieres hactenus non extiterant dotatæ in Wallia, Rex concedit quod Dotentur.*

(y) The oldeſt Deſcription of this *Curteſy*, now extant, is to be found in *Glanvil*, *Lib.* 7. *Cap.* 18. *p.* 60. But becauſe it is with greater Authority, and much better, expreſſed in a Writ 11 *H.* 3. I ſhall give it the Reader as I find it there, *viz. Cum conſuetudo & Lex Angliæ fuerit, quod ſi aliquis deſponſaverit aliquam mulierem, ſive viduam, ſive aliam hæreditatem habentem, & ipſe poſtmodum ex ea prolem ſuſcitaverit, cujus Clamor auditus fuerit inter quatuor Parietes, idem Vir, ſi ſupervixerit ipſam uxorem ſuam, habebit tota vita ſua Cuſtodiam Hæreditatis uxoris ſuæ, licet ea forte*

habuerit

as if they were peculiar to *England* (yy), were known not only in *Scotland* (z), but in *Ireland*, and in *Normandy* alſo (a); and the like Law or Cuſtom is to be found among the antient *Almain* Laws (b); and yet it doth not

habuerit Hæredem de primo Viro ſuo qui fuerit Plenæ ætatis. Rot. Clauſ. 11 *H.* 3. Hale Hiſt. of the Com. Law, 180.

Note, That it is ſufficient at this Day, that a Child be born alive, though not heard to cry. *Lit. Sect.* 35. 1 *Inſ.* 29. b. and that this Curteſy is fully treated of, 1 *Inſ.* 29. 8 *Rep.* 34.

(yy) *Such tenant eſt appel tenant per le Curteſie D'Engleterre, pur ceo que ceo eſt uſe en nul auter realme, forſq; tantſolement en Engletere.* Lit. Sect. 35.

(z) *Angli Curialitatem Anglicam vocant, quaſi ea apud ſolos Anglos locum haberet; ſed falluntur, nam apud nos (Scotos ſcil't) & Normannos huic Curialitati locus eſt* ——— *Curialitas ſive Curteſia eſt totius patrimonii uſusfructus quod ad uxorem pertinebat, dum moreretur* ——— *Competit autem hæc Curteſia quoties quis Hæredem Fœminam in uxorem duxerit, & ex ea ſobolem vivam ſuſceperit.* Crag. de jur. Feud. 312. Vid. Skene de Verb. ſignificatione ad Verb. Curialitas. Sir G. Mackenzie Inſ. of the Law of Scotland, Lib. 1. Tit. 6. Sect. 16. & Lib. 2. Tit. 9. Sect. 44.

(a) Vid. Cuſtum. de Norm. Cap. 119. 1 Inſ. 30. a.

(b) *Viz. Si qua mulier quæ Hæreditatem paternam habet poſt Nuptum pregnans peperit puerum, & in ipſa hora mortua fuerit, & Infans vivus remanſerit aliquanto ſpatio vel unius horæ, ut poſſit Aperire oculos & videre Culmen Domus, & quatuor Parietes & poſtea defunctus fuerit, Hæreditas materna ad Patrem ejus pertineat, & tamen ſi Teſtes habet Pater ejus, quod vidiſſent illum Infantem oculos aperire & potuiſſet*

not ſeem to have been Feudal (c); nor doth its Original any where ſatisfactorily appear: Some *Engliſh* Writers (d) aſcribe it to *Henry* I. but *Nathaniel Bacon* calls it a Law of *Countertenure* to that of *Dower*; and yet ſuppoſes it as ancient as from the Time of the *Saxons*, and that it was therefore rather reſtored by *Henry* I., than introduced by him (e): But as there are no Notices of this *Curteſy* among the Laws of the *Saxons*, or among thoſe we have of *Henry* I., I ſhall propoſe Mr. *Crag*'s Conjecture

iſſet Culmen Domus videre & quatuor Parietes, tunc Pater ejus habeat Licentiam cum Lege ipſas res defendere. Vid. LL. Alamannorum Tit. 92.

(c) *Maritus uxori non ſuccedit in feudo, etiam fœmineo, niſi ſpecialiter ſit inveſtitus.* Feud. Lib. 1. Tit. 15. Lib. 2. Tit. 13, 85. Ravenna in Conſuetud. Feud. Tit. 15. Stry. Exam. jur. Feud. Cap. 16. Q. 22, 23.

(d) The Author of the Mirror ſays, that *Grant fuit de la Curteſy le Roy Henry le premiere que touts ceux que ſurviviſſent leur femes dount elles uſſent conceive tenuſſent les heritages leurs femes a touts jours.* Mir. des Juſt. Lib. 1. Cap. 1. Sect. 3. p. 20. Vid. Seld. Jan. 65. Cowel Inſtit. Lib. 2. Tit. 2. Sect. 18.

(e) Vid. Bacon. Hiſt. Diſc. of the Eng. Gov. 105. 147.

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as the moſt rational I have met with, who is ſo far from thinking it *Feudal*, that he is of Opinion, that the Original of it *ex Jure Civili non incommode deduci poteſt*; *ex Conſtantini enim Reſcripto* (ſays he) *ſancitum eſt, ut hæreditatis maternæ Pater uſum-fructum, filii Proprietatem haberent* (f).

It being high Time to cloſe this Inquiry into the Nature of Eſtates held by *Common Socage*, I ſhall now briefly hint the ſeveral *Forfeitures* of ſuch Eſtates, and then ſubmit it.

Theſe *Forfeitures* are various, and may be conſidered as they reſpect either Eſtates in *Fee* or for *Life*.

1. *Forfeitures* of Eſtates in *Fee*, though they were very many by the Feudal (g), and Common (h) Law, are reduced, as the Law now ſtands, to *Forfeitures* by *Attainders* of *Trea-*

(f) Crag. de jure Feud. 312.

(g) Vid. Sup. p. 43, 44. & Spelm. Gloſſ. ad verbum Felonia.

(h) Vid. LL. Hen. I. Cap. 43. Glanv. Lib. 9. Cap. 4. fo. 68. b. & Bract. Lib. 2. Cap. 35. Sect. 11, 12.

ſon and *Felony*, (concerning which I have already ſaid as much as is neceſſary to my preſent Purpoſe, under the Head of *Eſcheat)* and by *Ceſſer*.

That we may form a right Notion of this Forfeiture by *Ceſſer*, it muſt be obſerved, that by the feudal Law, if the Vaſſal did not anſwer the Duties or Services of the FEUD, the Lord might anciently (in the Infancy of FEUDS) reſume it: But that, as the Feudal military Policy gradually ſubſided into a mix'd, a civil as well as military Policy, and gave way to Courts, regular Proceſs, and a judicial Determination of Right, Care was taken that no Vaſſal or feudal Tenant ſhould be diſpoſſeſſed or deprived of his FEUD or *Fee*, but for ſome determined and known Offence, and by the Judgment of his Peers (i), which he was ſo far bound to ſubmit

(i) *Nullus miles ſine certa & Convicta culpa ſuum beneficium perdat, niſi ſecundum conſuetudinem anteceſſorum ſuorum, & judicium parium ſuorum.* Vid. Feud. Lib. 3. Tit.

ſubmit to; that, if he neglected to appear in the Lord's Court upon the third Summons, the Lord ſhould be put into Poſſeſſion of the *Fee*, until he ſhould think fit to appear; which if he did within the Year, the Poſſeſſion was reſtored to him: If not, he totally loſt it (k). Thus ſtood the feudal Law; and this the Feudal

Tit. 1. Lib. 1. Tit. 7, 21, 22. Lib. 2. Longobard. Lib. 3. Tit. 8. Sect. 4.

Note, That *pares Curiæ qui ab eodem Domino feudum tenent* (Feud. Lib. 1. Tit. 26.) *& dicuntur convaſalli, ſive compares; quaſi ejuſdem Patroni cohærentes* (Hotom. de Verb. Feudal. ad Verb. Pares) *in eodem territorio* (Stry. Exam. jur. Feud. Cap. 25. Q. 2. Crag. de jure Feud. 377.) *Pares ſunt Appellati, quod ratione Hominii ac tenuræ ſibi invicem pares ſunt, uniq; Domino ſubſint, & pari lege vivant*——*Convaſalli autem diverſarum Baroniarum, ſeu territoriorum, eidem Domino ſubjecti, non dicuntur proprie pares.* Vid. Du Freſne & Spelm. Gloſſ. ad Verb. Pares.

(k) *Dominus vocat militem, qui ab eo feudum poſſidebat, dicendo eum in culpam incidiſſe, per quam feudum amittere debeat, hic non reſpondet: Quæritur, quid faciendum ſit Domino? Reſpondeo, eum ad Curiam vocari debere, & ſi non venerit, iterum eum debere vocari uſque in ſpatio tertio ſeptem vel decem dierum, arbitrio ejuſdem Curiæ terminando; quod ſi neq; venerit ad tertiam vocationem, hoc ipſo feudum amittat: Et ideo debet Curia Dominum mittere in poſſeſſionem. Sed ſi intra annum venerit, reſtituitur ei poſſeſſio: Alioquin & beneficium, & poſſeſſionem amittit.* Feud. Lib. 2. Tit. 22. Raven. in Conſuetud. Feud. 161.

and Common Law nearly agreed; inſomuch, that no *Freeholder* could, even at Common Law, be diſpoſſeſſed or diſſeiſed of his *Fee* or *Freehold*, without the like Judgment (l); but if he with-held the Services due to his Lord, the Lord might ſummon him into his own Court (m), and might, if he neglected to appear upon due Summons, for ſuch Neglect or Contempt, ſeiſe the *Fee* (n), and with-hold it from him, un-

(l) *Unuſquiſque per pares ſuos judicandus eſt, & ejuſdem Provinciæ: Peregrina vero judicia modis omnibus ſubmovemus.* LL. Hen. I. Cap. 31, 55. Vid. LL. Will. I. Cap. 27. And that this was the Common Law, appears from the Declaration *in Charta Johannis, viz. Nullus Liber Homo——diſſeiſiatur——niſi per legale judicium parium ſuorum, vel per legem terræ.* And from the like Declaration *in Charta Hen.* III. *viz. Nullus Liber Homo——diſſeiſiatur de libero tenemento ſuo, vel libertatibus, vel liberis conſuetudinibus ſuis——niſi per legale judicium parium ſuorum, vel per legem terræ.*

(m) *Omni Domino licet ſummonire hominem ſuum, ut ſit ei ad rectum in Curia ſua.* LL. Hen. I. Cap. 55. Vid. Le Mirror fo. 17, 172, 173. Bacon Hiſt. of the Eng. Gov. 202. Glanv. Lib. 9. Cap. 1. p. 69, a.

(n) *Si quis hominem habeat, qui ei nolit eſſe ad rectum, ſi quid de eo tenet poſt legitimam ſummonitionem* (Vid. LL. Will. I. Cap. 42.) *ſaiſiari faciat.* LL. Hen. I. Cap. 41.

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til he ſhould think fit to ſatisfy the Demand, or to appear, and make his Defence (o). This Seiſure was in the Nature of a *Diſtreſs*, and was probably the only *Diſtreſs* warranted (p) until the *Magna Charta* of King *John*, wherein the King makes the following Declaration; *viz.* " *Nec* " *nos nec Ballivi noſtri ſeiſiemus ter-* " *ram aliquam, nec redditum, pro* " *debito aliquo, quamdiu catalla debi-* " *toris ſufficiunt ad debitum redden-* " *dum*" (q). In Conſequence whereof, the King could not from thenceforth ſeiſe the *Fee*, but for want of Chattels. This Declaration, doubtleſs,

(o) *Si Dominus per conſiderationem Curiæ ſuæ pro defectu ſervitii ceperit tenementum tenentis ſui in manum ſuam, ſicut ſimplex namium, donec de redditu fuerit ſatisfactum —— cum talis cujus tenementum fuerit, optulerit de ſatisfaciendo, de redditu & arreragiis, reſtitui debet ei poſſeſſio, &c.* Bract. Lib. 4. Cap. 27. fo. 205. b.

(p) *Abuſion* (ſcil't de la Commen Ley) *eſt a diſtreiner pur arrerages de ſervices iſſuants de fiews per biens movables, ou nul diſtreſſe ne ſe doit faire forſque per le fiew.* Mir. 308. & Vid. ibid. 17.

(q) There is the ſame Declaration in *Mag. Char. Hen.* III. very little varied; *viz. Nos* vero vel *Balivi noſtri* non *ſeiſiemus*

leſs, was underſtood to extend equally to all inferior Lords; who might however ſtill, (for ought appears) as well as the King, for want of Chattels, diſtrain the *Fee*, itſelf: But this Power, together with all Juriſdiction relating to the *Fee*, was ſoon after taken from them by the *Statute* of *Marlbridge*, 52 *Hen.* III. Cap. 22. *viz. Nullus de cætero poſſit diſtringere libere tenentes ſuos ad reſpondendum de libero tenemento ſuo, nec de aliquibus ad liberum tenementum ſuum ſpectantibus ſine brevi Domini Regis:* In Conſequence whereof the Diſtreſs of all inferior Lords became abſolutely Perſonal; inſomuch, that, if there were no Chattels to be found within the *Fee*, Juriſdiction, or Diſtreſs of ſuch Lords (f), they had no Means in their

ſeiſiemus terram aliquam nec redditum pro debito aliquo, quamdiu catalla debitoris præſentia *ſufficiunt ad debitum reddendum*, & ipſe debitor paratus ſit inde ſatisfacere.

(f) *Nullus inſuper major vel minor——diſtrictiones faciat extra feodum ſuum, ſeu locum ubi Balivam habeat, vel Juriſdictionem.* Stat. Marlb. 52 Hen. III. Cap. 2.

own Hands to inforce the Performance of their Services; which being in ſome Reſpects inconvenient to them, it was afterwards provided by the Statutes of *Gloceſter* (t) *& Weſtm.* 2. (u), that in Caſe a Tenant ſhould ceaſe to pay his Rent for two Years, and there ſhould not during that Time be ſufficient Diſtreſs upon the Land, the Lord might have a *Ceſſavit*; and by Means thereof, if the Tenant did not tender his Arrears before Judgment, the Lord ſhould upon ſuch *Ceſſer*, recover the Land, or *Fee* its ſelf, and bar the Tenant for ever (x).

Beſides theſe Forfeitures by *Attainder* and by *Ceſſer*, the Lord *Hale* mentions another by *Alienation contra formam collationis* (y), which is ſuppoſed to have been grounded upon

(t) 6 Edw. I. Cap. 4.
(u) 13 Edw. I. Cap. 21.
(x) Vid. 2 Inſ. 295, 400, 460. Booth of real Actions 133, 134. F. N. B. 208. H. 209.
(y) Hale Anal. 110.

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the Statute *Weſtm.* 2. *Cap.* 41. But whether this Forfeiture be conſidered as a Forfeiture created, or revived, or inforced only (z) by this Statute, it is no otherwiſe worth our preſent Notice (a), than as it ſavours of the ancient feudal Reſtraint of Alienation, and may be thought to have had its Riſe from thence.

2. Eſtates for Life, beſides that they are forfeitable by *Attainder* and by *Ceſſer*, are likewiſe, agreeably to the Law of FEUDS (b), forfeited by *Waſt* (c), and by all ſuch Acts as in the Eye of the Law tend to deveſt or defeat the Reverſion or Remain-

(z) *Fitzherbert* ſays that the Writ *Contra formam Collationis* was given by the Stat. *Weſtm.* 2. (*F. N. B.* 211. *H*). as if the *Remedy*, rather than the *Forfeiture*, was given by that Statute. *Vide* 2 *Inſ.* 456, 457, 459. & *F. N. B.* 211. *F. G.*

(a) Becauſe, according to *Fitzherbert*, the Writ *De contra formam Collationis* lay *only* for Alienations by Abbots, *&c.* of Lands given before the Statute *Quia Emptores terrarum* to hold in *Frankalmoign*. *F. N. B.* 210. *F.* 211. *J.*

(b) Vid. Sup. p. 44.

(c) Vid. Le Stat. de Gloc', Cap. 5.

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der (d), or in any Manner to pluck the *Seigniory* out of the *Lords* Hands: *Nihil enim* (ſays *Glanvil) de jure facere poteſt Quis ſalva fide.*——*Quod vertat ad exhæredationem domini ſui*; and therefore (according to the ſame Author) *ſi quis aliquid ad exhæredationem Domini ſui fecerit, & ſuper hoc convictus fuerit, feodum quod de eo tenet, de jure amittet, & hæredes ejus* (e).

Having thus gone through the ſeveral Eſtates held by *common Socage*, I ſhall now briefly conſider ſuch *Tenures* as, upon my Diviſion of *Tenure* into *Tenures* by *Knight-Service* and *Socage* only, fall under the Head of *Socage*, and are yet denominated and uſually treated as particular *Species* of *Tenure*.

Theſe are either *Burgage* or *Gavelkind*.

(d) 1 Inſ. 251, 252.
(e) Vid. Glanv. Lib. 9. Cap. 1. p. 68. b. Bract. Lib. 2. Cap. 35. Sect. 11.

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Burgage (f) ſo called to denote the particular *Service* or *Tenure* of Houſes or Tenements in ancient *Cities* or *Burroughs* (g), is moſt certainly a *Species* of *Socage Tenure* (h); inaſmuch as ſuch Tenements are holden either by a certain annual Rent in Money (i), or by ſome Service relating to

(f) *Burgage* was a *Norman*, as well as an *Engliſh* Tenure. *Vid. Cuſtum. de Norm. fo.* 48. *a.* 51. *b.*

(g) *Burgagium eſt ſervitus quam qui Burga inhabitant pro Domiciliis ſuis præſtant.* Somn. Gloſſ. ad X. Script. Verb. Burgagium——*Et eſt appel Tenure en Burgage, pur ceo que les tenements deins le Burgh ſont tenus del Seignior del Burgh per* certain Rent, *&c.* Lit. Sect. 164. ——And becauſe the Service of the whole Borough was uſually rendered as an *intire* Farm or Rent to the King, ſuch Service, ſays Mr. *Madox*, was called *Burgage* or *Burgh-Service. (Vid. Mad. Hiſt. of the Exchеq. fo.* 226. —231. *& firma Burgi per tot.)* Thus in *Scotland*, *Burgage-holding* is, ſays Sir *Geo. Mackenzie*, that *Duty* which *Burghs Royal* are obliged to pay to the King by their Charters, erecting them in a *Burgh Royal*, and in this the *Burgh* is the *Vaſſal*, and not the particular *Burgeſſes. Macken. Inſ. of the Law of Scotl. Lib.* 2. *Tit.* 4. *Sect.* 9.

(h) *Tiel Tenure (en Burgage) neſt forſq; Tenure en Socage.* Lit. Sect. 164. Somn. Treat of Gav. 143. tho', according to *Nath. Bacon*, Tenants in *Burgage* were by their *Tenure* bound to the Defence of their *Borough*, which is in Account, ſays he, a Limb or Member of the Kingdom, and ſo in Nature of a *Caſtle-Guard.* Bacon Hiſt. of the Eng. Gov. 298.

(i) *Burgage* is no more than a yearly Rent, whereby Men of *Cities* and *Boroughs* held their Lands and Tenements

to Trade (k), and not by Military, (l) or other Service, that had no ſuch Relation (m).

The Qualities of this Tenure vary according to the particular Cuſtoms of every *Borough* (n), and that without Prejudice to the feudal Nature of it; it being a *Maxim*, as to improper

ments of the King, or any other Lord. *Tayl. Hiſt. of Gav.* 171. *Vid. Old Tenures Tit. Burgage & Lit. Sect.* 162, 163, 164.

Burgagium eſt ſervitus, quæ ——— plerumq; conſtat in Denariis quibus ſolutis Burgenſis ab omni alia liberatur ſervitute, &c. Somn. Gloſſ. ad X. Script. Verb. Burgagium. For anciently (ſays Mr. *Lambard)* when our Kings uſed not to receive Money of their Lands, but Victuals for the neceſſary Proviſion of their Houſe, Money was raiſed out of the *Cities* and *Caſtles*, in which Huſbandry and Tillage was not exerciſed, towards the Payment of the Soldiers Wages, and ſuch like Charges. *Lamb. Peramb. of Kent.* 227, 228.

(k) As to repair the Houſe of the Lord, *&c.* 1 Inſ. 109. a.

(l) *Burgagium———ad Militiam non pertinet, habeturq; ideo inter ignobiles tenuras.* Spelm. Gloſſ. ad Verb. Burgagium.

(m) *Burgage* is a *Tenure* no way ſmelling of the Plough or Tillage, being current and converſant in *Cities* and *Towns.* Somn. Treat. of Gav. 142, 148.

(n) *Tenures par Bourgage gardent les Couſtumes des Bourgh.* Cuſtum. de Norm. 48. a. 51. b. Vid. Lit. Sect. 165, 166, 167. Crag. de jur. Feud. 68.

Feuds eſpecially, that *Lex aut conſuetudo loci eſt obſervanda* (o).

The Properties of *Gavelkind Tenure* are ſo many, and the Qualities of it ſo different from thoſe of any other *Tenure*, that it ſeems to have been doubted (p), whether it be a *Tenure* of a feudal Nature or not: It is certain that the *Gavelkind* Tenant retains ſtrong Marks of *Propriety*, as Power to alien, even at the Age of Fifteen (q), Freedom from Forfeiture for Felony (r), and many other Privileges (ſ) unknown to Perſons holding

(o) Vid. Sup. p. 37.

(p) Vid. Spelm. Treat. of Feuds 12, 38. & Gloſſ. ad Verb. Gaveletum.

(q) Vid. Lamb. Peramb. of Kent 614, 633, 643. Somn. Treat. of Gav. 8, 9.

(r) Lamb. Peramb. of Kent 634, 635.

(ſ) It has been doubted whether the *Gavelkind* Tenant's Power of Deviſing, before the Statute of Wills, was not a Privilege and Property of *Gavelkind Tenure*; but it is now agreed, that ſuch Power was not a Quality of *Gavelkind*, but a Privilege advanced by particular Cuſtoms, collateral and foreign to the Cuſtom of *Gavelkind*. (*Vid. Somn. Treat. of Gav.* 151—172. 1 *Lev.* 80. 1 *Syd.* 135, 138. 2 *Syd.* 153. *Cro. Car.* 561.) And yet conſidering a Deviſe as a kind of Alienation, (*extranei Hæredis*

holding their Lands by any other Kind of *Tenure*: And it is as certain, that the *Tenure* is ſtrictly Feudal, and, like the more uſual *Tenures* by *Knight-Service* and *Socage*, denominated from the Kind or Nature of the prevailing Service; which was, as the Name imports, Tributary or Cenſual; the Word *Gavelkind* being (as Mr. *Somner* hath, with great Labour and Learning, proved) (t) a Compound of the *Saxon* Words *Gavel* (variouſly written *Gafol* or *Gable*) and *Gecynde*; the former whereof ſignifies Tribute, Tax (u), or Rent (x), and the latter Kind, Sort or Quality: So that the two Words put together, ſuggeſting ſomething of a *cenſual* Nature, do, when applied to Lands, directly import that ſuch

Hæredis inſtitutio eſt quaſi Alienatio. Crag. de jur. Feud. fo. 13.) the *Gavelkind* Tenant's Power of Deviſing might poſſibly be inferred from his ancient Power to alien.

(t) Vid. Somn. Treat. of Gav. fo. 12—35, 37.

(u) Seld. Jan. 129. Benſon's Vocabular. Anglo-Sax.

(x) 1 Inſ. 142. a. 2 Inſ. 402.

Lands

Lands are *Cenſual* or *Rented* (y): And yet we are not, ſays Mr. *Somner*, to perſwade ourſelves that *Gavelkind* Land was *Cenſual* only, or that it was not, or is not in its Nature, liable to any other Kind of *Service*, there being many Evidences ſtill extant, that ſufficiently prove the contrary (z).

Suppoſing this Etymon to be altogether as true as it is rational, it muſt be allowed, that *Gavelkind* doth not (more than *Socage) ex vi termini*, import any thing inconſiſtent with or contradictory to the Nature of a FEUD or *Fee*, but that it doth ſimply denote

(y) The ſeveral Opinions advanced before Mr. *Somner*'s Time, concerning the Etymology of Gavelkind, are collected and anſwered by him in his Treatiſe of *Gavelkind*, fo. 3, 4, *&c.* and therefore need not here be repeated.—— There is indeed a new Conjecture advanced by Mr. *Taylor*, in Oppoſition to Mr. *Somner*, which is very particular, and perhaps hardly worth our Notice; but yet, as it is new and particular, it may not be impertinent, barely to note it. *Gavelkind* then, in his Opinion, is a Compound of the *Britiſh* Words *Gafael* (written in *Engliſh Gavel)* which ſignifies *Tenura* or *Hold* (from the *Britiſh* Verb *Gafaelu tenere, prehendere)* and *Cennedl*, which ſignifies *Generatio aut familia*, and that ſo *Gavel Kennedl* might ſignify *Tenura familias aut Generationis.* Vid. Taylor's Hiſt. of Gav. 92—98, 132.

(z) Vid. Somn. Treat. of Gav. 57, 58, 59.

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a *Difference* ariſing from a particular or prevailing Service, and that it may therefore be a *Tenure* of a feudal Nature, as well as any other: And that it was really ſuch, is apparent from the Obligations or Services of *Fealty* (a), and *Suit* of *Court* (b), which were always as clearly incident to this, as to any other *Tenure*: Beſides, a *Gavelkind* Tenant is under much the ſame Penalty of *Ceſſer* (c), as ſtrictly bound to perform all the Services of his *Tenure* as any other Tenant. Lands of this Nature do alſo *eſcheat*, and return to the Lord, for *want* of *Heirs*, though not for *Felony* (d); and even in Caſes of *Felony*, if the Felon withdraw himſelf out of the Country, and be afterwards outlawed, or take ſanctuary and abjure the Realm, the King is intitled to

(a) Lamb. Peramb. of Kent 614, 650.
(b) Lamb. ibid. 614, 639. Somn. Treat. of Gav. 57, 58.
(c) Lamb. ibid. 612, 647. Somn. Treat. of Gav. 31. and Taylor Hiſt. of Gav. 121, 122.
(d) Lamb. ibid. 610, 636, 637.

the *Year* and *Waſt* of his Lands and Tenements, and the Lord may afterwards take to them as an *Eſcheat* (e): ſo that we may, without more ado, fairly conclude, that this *Tenure* is, like *Burgage*, a Kind of *Socage Tenure* (f), and that it is as really *Feudal* as any other *Species* of *Tenure*.

If this Concluſion be juſt, the Reader may poſſibly aſk, how the Privileges and Qualities of this *Tenure* are then to be accounted for? The learned Mr. *Somner* declined this Queſtion, as matter of Enquiry beyond his Skill, and therefore I ſhall not attempt to anſwer it; eſpecially ſince it will ſerve my Purpoſe, altogether as well, to obſerve, that, if we conſider 1ſt the great Variety of *improper* FEUDS (g); 2dly, that *Fealty* is the only thing eſſentially neceſſary to the Being of ſuch

(e) Lamb. Peramb. of Kent. 610. Cuſtom of Kent ibid. 636, 637.
(f) Lamb. ibid. 585, 587. Bro. Tit. Tenure 72.
(g) Vid. Sup. p. 32.

FEUD (h); 3dly, that the *Gavelkind* Tenant's Power of Alienation is the *Difference* or diſtinguiſhing Property of all *alienable* FEUDS (i); And 4thly, that the groſſeſt *Felonies* might, according to the *Feudiſts*, be remitted (k), and the Son's Right of Succeſſion, in many Caſes remain, notwithſtanding the Fault of the Father (l); It will, upon theſe Conſiderations, ſufficiently appear, that the principal Qualities of *Gavelkind* are adventitious, and that they might, without Preju-

(h) Vid. Sup. p. 32, 35.

(i) Vid. Sup. p. 33, 34.

(k) *Dominus poteſt Feloniam remittere.* Zaſius in Uſus Feud. Cap. 10. fo. 95.——*vel expreſſe, ſi verbis hoc declaretur; vel tacitè, ſi non attento delicto nihilominus eum pro vaſallo agnoſcat, vel de culpâ non conqueſtus moriatur.* Stry. Exam. jur. feud. Cap. 23. Q. 45.

(l) *Si vaſalli delinquentis deſcendentes vel agnati ad feudum nomine proprio, non ex vaſalli delinquentis perſona venirent, ejuſdem delictum ipſis non noceret, ut ſi ſtatum ab initio Feudi Dominus vaſallo feudum pro ſe, ſuis deſcendentibus, & agnatis, nominatim conceſſiſſet, vel id ipſum vaſallus in ſtipulationem expreſſe deduxiſſet——Deniq; ſi feudum ob eam cauſam alicui conceſſum fuerit, quod concedentem ab hoſtibus eripuerit, vel alias a morte liberavit, ex nullius delicti cauſa amitti, & per conſequens Domino vel agnatis aperiri poterit.* Hanneton. de jure feud. Lib. 3. Cap. 17. fo. 391—393. Craig. de jure feud. 373.

dice to its feudal Nature, have been communicated to any other *Species* of *Tenure*; and conſequently that they do not, any of them, impeach the Truth of what I have hitherto ſuggeſted concerning the feudal Nature of this particular *Tenure*.

As for the famous *partible* Quality of moſt of the Lands in *Kent* (m), I will venture to ſay, that it was not a *particular* or *proper* Effect of *Gavelkind* Tenure (n): But that it was rather the ancient Courſe of *Diſcent* retained and continued in that *County* (o): And how particular ſoever the Con-

(m) Not all, for even in *Kent*, thoſe ancient *Tenements* or *Fees*, ſays the Lord *Hale*, that are there held anciently by *Knight-Service*, are deſcendible to the eldeſt Son. *Hale Hiſt. of the Com. Law* 225. *Vid. Le Stat.* 31 *Hen.* VIII. Cap. 3.

(n) For the preſent Tenure only, ſays Mr. *Lambard*, (*Peramb. of Kent.* 592.) guideth not the Diſcent, but the Tenure and *Nature* (*i. e.* the ancient partible Nature of it) together do govern it.——And Mr. *Somner* (*Treat. of Gav.* 89.) infers from *Glanvil* and *Bracton*, that it is a requiſite and eſſential Property in Land of ſuch (partible) Diſcent, that it is not only by *Nature* partible, but withal, that by *Cuſtom* and of *Old* it hath actually been parted.

(o) Vid. Somn. Treat. of Gav. 89, 90.

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tinuance of this Courſe of *Diſcent* may appear to us at this Day, yet, if we conſider *Gavelkind* as a *Species* of *Socage Tenure*; and that all *Tenures* by *Socage*, or of the Nature of *Socage*, were anciently in Point of Succeſſion *diviſible* (p); and that they might, without Prejudice to their feudal Nature, deſcend equally or otherwiſe, as beſt ſuited the Genius and Uſage of every Country (q): It will appear much more extraordinary, that all other Counties ſhould depart from this, the more ancient and natural Courſe of Diſcent, than that this particular County ſhould retain it.

Having thus, I hope, in ſome Sort, diſcovered the Nature of *Te-*

(p) Vid. Sup. p. 176.

(q) *Calthrope* (in his Reading, ſhewing the Relation between Lord and Copyholder *p.* 22.) ſuppoſes this Cuſtom to have prevailed in *Kent*, as beſt ſuiting with the Conſtitution or Circumſtances of that *County*, which had been ſubject to foreign Invaſions, and that the Inheritance therefore deſcended in *Gavelkind*, that every Man there might be of Power for Reſiſtance.

nures, whether by *Knight-Service* or *Socage*, in the largeſt Senſe, it remains only that I take ſome ſhort Notice of *Copyholds*, which, becauſe they fall not within my general Diviſion, muſt be conſidered as a *diſtinct Species* of *Tenure*.

Copyholds then are the Remains of *Villenage* (r), which, conſidered as a *Tenure* (ſ), was not intirely *Saxon* (t), *Norman* (u), or *Feudal* (x), but a *Tenure* of a mix'd Nature, ad-

(r) Vid. F. N. B. 12. C. 1 Inſ. 58. a. Bacon (afterwards Lord *Verulam*) Uſe of the Law 42, 43.

(ſ) The Author of the *old Tenures*, and *Littleton*, do both of them treat it not only as a *Tenure*, but as a *State* of *Bondage*. *Vid. Old Tenures, and Lit. Tit. Villenage.*

(t) The Termination of *Villenage*, and the *Fealty* incident to the *Tenure*, prove that it was not *Saxon*, or prior to other *Tenures*; and therefore ſuch Authors, as ſuppoſe *Villenage* to have been in *England* before the *Conqueſt*, muſt be underſtood to ſpeak of it as a State of *Bondage*, and not as a real *Tenure*. *Vid. Somn. Treat. of Gav.* 65, 66. *Temp. Introd. to the Hiſt. of Engl.* 59.

(u) There is no Title or Hint of any ſuch *Tenure* in the Cuſtumier of *Normandy*.

(x) For the Feudiſts make no Mention of any ſuch Tenure, and therefore *Crag.* treats it as a *Tenure* peculiar to the *Engliſh*, *& quaſi Scintilla ſervitutis apud Anglos adhuc latens. Crag. de jur. Feud.* 71. Beſides *Livery* or *Inveſtiture* is wanting, which is clearly neceſſary to every *Fee* or *Tenure*. *Vid. ſup. p.* 37.

vanced upon the *Saxon Bondage*, and which gradually ſuperſeded it: So that we muſt look partly at Home for its Original, which, though it cannot be traced without running into greater Length and Nicety, than would be agreeable to my preſent Deſign, may poſſibly be hinted in a very few Words: For if the *Normans* found, as we are aſſured they did (y), "A Sort of People among us "who were, as Sir *William Temple* "ſays, in a Condition of downright "Servitude, uſed and employed in "the moſt ſervile Works, and be-"longed, they, their Children and "Effects to the Lord of the Soil, "like the reſt of the Stock or Cattle "upon it" (z); nothing is more likely than that they, who were Strangers to any other than a feudal

(y) Vid. Temp. Introd. 59. Bacon Hiſt. of the Eng. Gov. 56. Brady Gen. Pref. 26. & Spelm. Gloſſ. ad Verb. Servus.

(z) Perſons of this Condition were called by the *Saxons Theow & Theowmen*, and in the *Latin* Laws of *Will.* I. (*Cap.* 65, 66.) and of *Hen.* I. (*Cap.* 77, 78.) *ſervi.*

State, ſhould infranchiſe all ſuch wretched Perſons as fell to their Share, by admitting them to *Fealty* (a), in Reſpect of the little *Livings* they had hitherto been allowed to poſſeſs meerly, as the ſcanty Supports of their baſe Condition; and which they were ſtill ſuffered to retain upon the like Services, as they had in their former Servitude been uſed and employed in: But this Poſſeſſion, as now cloathed with *Fealty*, and by Means thereof advanced into a Kind

(a) That the Admiſſion of a *Bondman* to *Homage* or *Fealty* amounted to *Infranchiſement*, appears from the Mirror (*Lib.* 2. *Sect.* 28. *p.* 167, 168.) *Devient ſerfs frank ſi ſon ſeignior preigne lour Hommage* ——— *ou ſufre ſon ſerf* ——— *jurour entre francs a ſoyer de frank Sachant* ———. *Bracton* therefore mentions *Homage* as a Method of *Infranchiſement* equivalent to *Manumiſſion*, *viz. Tenementum nihil confert* ——— *perſonæ, niſi præcedat Homagium vel Manumiſſio.* Vid. Bract. Lib. 2. Cap. 8. Sect. 1. fo. 24. b. And this ſeems to be the true Senſe of *Littleton*, *Sect.* 206, 207. where it is ſaid, that if the Lord give his *Villein* any Lands in *Fee Simple*, *Fee Tail*, *for Life*, or *for Years*, it is an *Infranchiſement*; but that a Leaſe at Will is not. The Reaſon is plain, becauſe a meer Tenant at Will is not admitted to *Fealty*; whereas *Fealty* is incident to every other Eſtate, whether in *Fee*, for *Life*, or for Years.

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of *Tenure* (b), differed very much from the ancient ſervile Poſſeſſion, and was from henceforth called *Villenage* (c).

Our *Saxon* Anceſtors again having, as above, ſubmitted to the feudal Law, which was a Law of Liberty, may be ſuppoſed to have imitated, ſome ſooner than others (d), the Generoſity of the *Normans*, and to have done the like: But neither did

(b) Vid. Leg. Will. I. Cap. 29, 33.

(c) Such Tenant ſeems to have been firſt called *Vilain* in the *French* Laws of *William* I. (*Cap.* 29.) poſſibly from the *Latin* Word *Vilis* (*Vid. Cowel Interp. and Skinner Etymolog. ad Verb. Villain*). He was however, in the *Latin* of thoſe Times, called *Villanus, a Villa, quia in Villa habitavit, & operibus ruſticis, plerumque ſordidis, exercebatur. Vid. Spelm. Gloſſ. ad Verb. Villanus, & 1 Inſ.* 116. *a.* Such Tenant had no Freehold by the Courſe of the Common Law, (*Lit. Sect.* 81.) no Vote in the making of Laws (*Bacon Hiſt. of the Eng. Gov.* 56.) nor could he before the Statutes 1 *Rich.* III. *Cap.* 4. 11 *Hen.* VII. Cap. 26. and 19 *Hen.* VII. *Cap.* 16. be a Juryman (*Vid. LL. Hen.* I. *Cap.* 29.) nor was he really of any Account in the State; *Propriety* being the *Baſis* of a feudal Policy in *England*, and of all the Rights as well as Obligations conſequent to it.

(d) *Sub Ricardo ſecundo pars ſervorum maxima ſe in Libertatem vindicavit* (Vid. Spelm. Gloſſ. ad Verb. Lazzi, & Somn. Treat. of Gav. 58.) And yet there were *Bondmen*, or, as then called, *Villeins*, in the Time of *Hen.* VII, as appears from the Stat. 19 *H.* 7. *Cap.* 15.

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our *Saxon* or *Norman* Anceſtors mean to increaſe or ſtrengthen the Poſſeſſion of their Villeins, but meant to leave that altogether as dependent and precarious as before, ſave only that, as by their Admiſſion to *Fealty*, their Poſſeſſion was put, in ſome Meaſure, upon a feudal Foot, their Lords could not, in regard to the *Fealty* implied on their parts (e), deal with them ſo wantonly as before; nor could they, ſo long as they anſwered the Services and Conditions of their Poſſeſſions or Tenure, in Honour or Conſcience, deprive or remove them (f): And yet they were for a long Time left meerly to the Conſcience

(e) The Obligations of *Fealty* being mutual, *ut ſup. p.* 12, 13. *in Marg.*

(f) In this Reſpect therefore Sir *H. Spelman*, ſpeaking of the Infant State of Feuds, when they were Precarious and Arbitrary *(ut ſup. p.* 14.) ſays truly that, *Priſcam eorum Naturam admodum apud nos hodie exprimit terrarum Conditio, quæ, ut loquuntur Forenſes noſtri, tenentur ad Voluntatem per Copiam Rotulorum Curiæ vulgo* Copyholds *nuncupatæ.* Vid. Spelm. Gloſſ. ad Verb. Feudum & Felonia, & LL. Will. I. Cap. 33.

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of their Lords (g), which they might, as they could, awaken by their Petitions, but could not otherwiſe deal with; until the uninterrupted Benevolence and good Nature of the ſucceſſive Lords of many Manors, having Time out of Mind permitted them, or them and their Children, to enjoy their Poſſeſſions in a Courſe of Succeſſion, or for Life only, became at length cuſtomary and binding upon their Succeſſors (h), and advanced ſuch Poſſeſſion into the legal Intereſt or Eſtate we now call *Copyhold* (i); which yet remains ſubject

(g) Until the Time of *Edw.* IV. and perhaps for ſome Time after, it appearing by *Littleton* (*Sect.* 77.) that it was, even in his Time, doubted, whether a Copyholder had any legal Remedy againſt his Lord.

(h) In ſome Manors as early as *Henry* III's Time. *Vide Calthrope Reading, &c.* 3, 4, 7.

(i) Copytenants, Copyholders, or Tenants *per* Copy ——— *d'ancient temps fuer' appelles tenants en Villenage* ——— *& ceo appiert per les aunciennes Tenures, &c. F. N. B.* 12. C. Vide Bro. Tit. Villenage. 63. ——— Tenants at Will, by Copy of Court Roll, being in Truth *Bondmen* at the Beginning, but having obtained Freedom of their Perſons, and gained a Cuſtom by Uſe of Occupying their Lands, they are now called Copyholders, and are ſo privileged, that the Lord cannot put them out, and all through Cuſtom. *Bacon Uſe of the Law* 43.

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to the ſame ſervile Conditions, and Forfeitures, as before, they being all of them ſo many Branches of that Continuance or Cuſtom, which made it what it is.

From this View of the Original and Nature of *Copyholds*, we may poſſibly collect the Ground of the great *Variety* of *Cuſtoms*, that influence and govern theſe Eſtates in *different* Manors; it following from the preceding Account, if true, that they are no other than Cuſtomary Eſtates, after the ancient Will of the firſt Lords, as it is preſerved and evidenced by the Rolls, or kept on Foot by the conſtant and uninterrupted Uſages of the ſeveral Manors wherein they lie (k).

Having thus conſidered all the *Tenures* ſubſiſting among us at this Day, I muſt now ſubmit the Whole

(k) This I take to be the Senſe of *Littleton*, *Sect.* 73, 75, 77. *Sed Quære.*

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of this Eſſay to the farther Enquiry and Correction of the Reader; advertiſing him only, that as the Attempt is new, and the Subject much obſcured by Time, and Want of Contemporary Lights to clear it; the Author begs Allowances for Miſtakes, and that the Reader will better inform him.

F I N I S.

APPENDIX.

IT being ſaid (Introd. p. 84, 85.) that the Charter of K. *John* materially varied from the *Capitula Baronum*, it may not be improper to point out an important Difference or two relating to *Eſcuage and Aid*, and the *Commune Conſilium Regni*, by which they were to be impoſed or aſſeſſed.

In the *Capitula* it is ſtipulated, *Ne ſcutagium vel auxilium ponatur in regno, niſi per Commune Conſilium regni, niſi ad corpus regis redimendum, & primogenitum filium ſuum militem faciendum, & filiam ſuam primogenitam ſemel maritandam, Et ad hoc fiat rationabile auxilium. Simili modo fiat de tailagiis & auxiliis de civitate London, & de aliis civitatibus quæ inde habent libertates.*

In *Carta Johannis* it is declared, that *Nullum ſcutagium vel auxilium ponatur in regno noſtro, niſi per Commune Conſilium regni noſtri, niſi ad corpus noſtrum redimendum, & primogenitum filium noſtrum militem faciendum & ad filiam noſtram primogenitam ſemel maritandam,*

tandam, & ad hæc non fiat niſi rationabile auxilium, ſimili modo fiat de auxiliis, de civitate London. Et ad habendum Commune Conſilium regni de auxilio aſſidendo, aliter quam in tribus caſibus prædictis, vel de ſcutagio aſſidendo, ſummoneri faciemus Archiepiſcopos, Epiſcopos, Abbates, Comites & Majores Barones ſigillatim per litteras Noſtras, & præterea faciemus ſummoneri in generali per Vicecomites & Ballivos noſtros, omnes illos qui de nobis tenent in Capite *ad certum diem, ſcilicet ad terminum quadraginta dierum ad minus, & ad certum locum, & in omnibus litteris cauſam illius ſummonitionis exprimemus, &c.* This Clauſe *et ad habendum Commune Conſilium regni, &c.* is not warranted by the *Capitula*, but is an Addition, and a plain Departure from the true Senſe of the Words *Commune Conſilium regni*, which was from the Time of *William* I. to the Time of K. *John*, and in the Beginning of the Reign of *Henry* III, the name of the great Council, or Parliament as now called, and conſiſted of the ſame Members as in the earlieſt Time of *William* I. and the Times before him, when there were no *Tenants in Capite* or *Tenures* exiſting as a Branch of the national or governing Policy of the Kingdom. Beſides, it was an unneceſſary, if a harmleſs Addition, the former Clauſe being abſolute and complete, and agreeable to the Demands of the Barons; ſo that it is not to be ſuppoſed, or even imagined, that K. *John*'s Declaration, in the Temper he then was, that he would ſummon

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in generali all his Tenants *in Capite*, excluding or overlooking all other *liberi homines regni*, was ſatisfactory to them, or that they acquieſced in ſuch Reſtriction. None of the Monkiſh Hiſtorians of thoſe Times, that I have met with, obſerve any Difference between the *Capitula* and the Charter of King *John*, nor between the Charters of K. *John* and of *Henry* III. nor do they take Notice of any Diſcontent upon Account of any Difference between them, but, on the contrary, *Mat. Paris* confidently affirms, that *Cartæ utrorumq; regum in nullo inveniuntur diſſimiles:* Yet it is plain, from the Diſcord and Diſcontent ſubſiſting during this Reign, and what followed in the Times of *Henry* III. and *Edward* I. that the Barons or *liberi homines regni* were not eaſy, till they were admitted to their Share or Footing in the *Commune Conſilium*, which was at length obtained in the way of Repreſentation by Knights, Citizens, and Burgeſſes choſen and authorized by them to meet and act for them. The preciſe Time or Manner of this Regulation, or the Inducements to it, do not appear, the Hiſtorians of thoſe Times being ſilent, and the Records loſt or deſtroyed. It is however obſervable, that this Attempt of K. *John* to introduce a kind of Repreſentation of all the *liberi homines regni* by his Tenants *in Capite*, tho' it did not take effect, ſhews that a kind of Repreſentation, or rather Reſtriction of the *Commune Conſilium*, was then thought of; and as a reaſonable and

proper Repreſentation was no doubt a deſireable Meaſure to prevent tumultuary, confuſed, and diſorderly Councils, it can be no wonder that a proper Repreſentation was ſoon after eſtabliſhed. It appears by the Charter 1 *Henry* III. that the *Capitula in priori Carta* (Johannis) *de ſcutagiis & auxiliis aſſidendis* were among others *quæ gravia & dubitabilia videbantur*, at that Time in ſome Sort conſidered, and for their Weight and Importance reſpited to a fuller Council. *Et tunc* (ſays the Charter) *faciemus pleniſſime tam de hiis quam de aliis quæ occurrerint emendenda quæ ad communem omnium utilitatem pertinuerint & pacem & ſtatum noſtrum & regni noſtri.* Blackſtone Mag. Carta 35, 36. And it does in ſome Meaſure appear, that the Conſideration of them was not totally neglected 9 *Henry* III. for tho' the Charter 9 *Henry* III. is ſilent as to *Aids*, yet in reſpect of *Eſcuage* there is an expreſs Proviſion, *c.* 37. that *Scutagium de cætero capiatur ſicut capi tempore regis Henrici avi noſtri conſuevit.* It does not indeed appear by the Charter 9 *Henry* III. that the Regulation or Reſtriction of the *Commune Conſilium* attempted by King *John* was at that Time conſidered, there being no mention of the *Commune Conſilium* in that Charter; but, as the King was then young, and an Attempt to regulate or in any reſpect vary the *Commune Conſilium*, might upon that Account be thought premature and improper, we may reaſonably ſuppoſe, that it was again reſpited to the full Age of the King; for it is very certain, that

the Repreſentation by Knights, Citizens and Burgeſſes took place ſome time in this King's Reign, perhaps not many Years after his full Age; for tho' the firſt Summons of a *Parliament* (as now called, and probably ſo called ſoon after this Regulation) that is now extant or has been hitherto found, was 49 *Henry* III. (*Clauſ.* 49 *Henry* III. *dorſ.* 10, 11. *Dugd. Summons to Parl.* 1, 2, 3.) yet the Form of Summons ſeems to have been at that Time well digeſted and known, and to have iſſued upon an Eſtabliſhment of ſome ſtanding; for the Writs are not entered at large upon the Roll, as Originals or Precedents generally are, but only Notes or Remembrances in the following Words: * *Item Mandatum eſt ſingulis Vicecomitibus per Angliam quod venire faciant duos milites de legalioribus & diſcretioribus militibus ſingulorum Comitatuum ad regem London, in octabis prædictis in forma ſupradicta. Item in forma prædicta ſcribitur Civibus Ebor' Civibus Lincoln' & cæteris Burgis Angliæ; quod mittant in forma prædicta duos de diſcretioribus & legalioribus & probioribus tam civibus, quam Burgenſibus ſuis.* But be this as it might, it muſt be obſerved, that from the Time of this Regulation, whenever it was, or indeed from the Time of K. *John*, we hear nothing more of a Repreſentation by, or Reſtriction of the *Commune Conſilium* to, the King's Tenants *in Capite*; ſo that we may reaſonably conclude that all Differences upon

* *Dugd. Summons* 3.

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this Head were ſatisfactorily compoſed by this Regulation.

But ſtill there remained Cauſe of Uneaſineſs, becauſe the *Capitula Baronum* and *Carta Johannis de auxiliis* were totally diſregarded during this Reign, and nothing was done to quiet the Minds of the People in reſpect of *Aid* until 25 *Edward* I. when all Jealouſies were ſilenced by the King's *Confirmatio Cartarum* under Seal, 5 *Nov.* 1297. and the Stat. 25 *Edward* I. which effectually revived and inforced the Declaration in King *John*'s Charter, that no *Aid* ſhould be impoſed or taken but by *Common Aſſent de tut le roiaume. Vide Blackſtone Mag. Carta*, 8*vo. p.* 80. St. 25 *E.* 1. *c.* 5, 6.

I would not trifle upon a Subject ſo important, yet I cannot help obſerving from the Language of the old Statutes, *la Commune, tote la Commune d' Engleterre, le Commonaltie, tout le Comminalty*, & *Communaute de la terre, Communitas regni, Commen, Commen de tout le Royalme, Commen aſſent, Commen accorde, &c.* how tenacious and fond our Anceſtors were of the Word COMMUNE, and that the Commons and Commonalty of *Great Britain* retain and glory in it at this Day.

Ex. G. A. A.

FINIS.